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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

84-1406

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. ANTHONY MARRESE M.D. and BONE AND JOINT SURGEONS, INC.

Petitioners,

v.

INTERQUAL INC. et al.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1581

R. ANTHONY MARRESE, M.D., and
BONE & JOINT SURGEONS, INC.,

Plaintiffs-Appellants,

v.

INTERQUAL, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 82 C 4296—George N. Leighton, *Judge.*

ARGUED MARCH 29, 1984—DECIDED NOVEMBER 6, 1984

Before BAUER, COFFEY, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* Plaintiffs-Appellants, R. Anthony Marrese, M.D., and Bone & Joint Surgeons, Inc., appeal the judgment of the United States District Court for the Northern District of Illinois dismissing the plaintiffs' claims under of the Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2, for lack of subject matter jurisdiction. We conclude that the defendants' conduct in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess Hospital, in Evansville, Indiana, be revoked, is exempt from the Federal antitrust laws under the doctrine of "state action," and thus we affirm the dismissal of the plaintiffs' claims under the Sherman Act §§ 1, 2.

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I

The record reveals that Dr. R. Anthony Marrese, is a Board certified orthopedic surgeon who specializes in the treatment of spinal disorders. Dr. Marrese is the sole shareholder of Bone & Joint Surgeons, Inc., an Indiana corporation with its principal office in Evansville, Indiana. He is licensed to practice medicine in the states of Illinois and Indiana and, at the commencement of this lawsuit, had clinical privileges to practice at Deaconess Hospital, a non-profit corporation located in Evansville, Indiana.[1]

In February 1978, a Special Ad Hoc Committee ("SAHC") comprised of selected members of the medical staff at Deaconess Hospital conducted an audit of the surgical "back" procedures performed at Deaconess.[2] The results of that audit raised questions concerning the "appropriateness of the surgeries performed by Dr. Marrese." Accordingly, the SAHC recommended to the medical staff at Deaconess that all of Dr. Marrese's lumbar laminectomy and spinal fusion cases be monitored, and that any case without a positive radiological finding be subjected to a mandatory second opinion. In August 1980, the SAHC retained Interqual, Inc., an independent, non-affiliated company engaged in the business of performing medical audits, to conduct a further audit of Dr. Marrese's lumbar and cervical surgical procedures. Based upon the findings of the Interqual audit, the SAHC recommended

[1] At oral argument the plaintiffs' counsel informed this court that Dr. Marrese "is no longer practicing in Evansville," but counsel failed to provide this court with any information concerning Dr. Marrese's status at Deaconess Hospital, much less his underlying reason for no longer practicing in Evansville, Indiana. It is clear from the plaintiffs' first amended complaint that Dr. Marrese's clinical privileges at Deaconess had not been revoked prior to the filing of this lawsuit in July 1982.

[2] According to the plaintiffs' first amended complaint, the "back" procedures audited by the SAHC included, *inter alia*, fifty lumbar laminectomies and forty spinal fusions performed by orthopedic surgeons on the staff at Deaconess Hospital.

to the Medical Staff Executive Council at Deaconess that Dr. Marrese's clinical privileges be revoked. On April 28, 1982, the Medical Staff Executive Council adopted the recommendation of the SAHC but stayed implementation of Dr. Marrese's clinical privilege revocation, pending a hearing as required by the hospital's Fair Hearing Plan.

The Fair Hearing Plan at Deaconess was adopted by the medical staff in June 1979 "to provide every practitioner with one evidentiary hearing and with one appellate hearing in the event that any action is taken [including revocation of clinical privileges] by the Medical Staff Executive Council . . . or the Board of Directors of the Hospital." The medical staff's authority to review professional practices within its hospital is provided for in the State of Indiana statutory code:

> "The governing board of the hospital shall be the supreme authority in the hospital
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> * * *
>
> The medical staff of a hospital shall be an organized group which shall be responsible to the governing board . . . and shall have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. *This review shall include, but shall not be limited to, the quality and necessity of the care provided patients . . . .*"

Ind. Code § 16-10-1-6.5 (1982) (emphasis added). The Indiana statutory scheme for quality control of the medical profession further provides that the personnel of:

> "a committee having the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint

* * *

> shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care . . . ."[3]

Ind. Code §§ 34-4-12.6-1(c), 34-4-12.6-3(c) (1982).[4] The procedure to be followed in reviewing professional practices within a hospital is set forth in Ind. Code § 34-4-12.6-2(b):

> "Any professional health care provider under investigation shall be permitted at any time to see any records accumulated by a peer review committee pertaining to his personal practice and shall be offered the opportunity to appear before the peer review committee with adequate representation to hear all charges and findings concerning his practice and to offer rebuttal information, which shall be a part of the record before any disclosure of the charges and findings hereunder."

The Fair Hearing Plan adopted by the medical staff at Deaconess affords any practitioner adversely affected by a recommendation or action of the Medical Staff Executive

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[3] The Indiana legislature defines good faith as "an act taken without malice after a reasonable effort to obtain the facts of the matter and in the reasonable belief that the action taken is warranted by the facts known." Ind. Code § 34-4-12.6-1(f) (1982).

[4] Effective April 1983, the Indiana legislature amended Ind. Code § 16-10-1-6.5 to provide in pertinent part:

> "The governing board and its employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated, if such reports or actions are made in good faith and without malice."

Ind. Code Ann. § 16-10-1-6.5(b) (Burns Supp. 1983).

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Council or the Board of Directors, the right to an evidentiary hearing.[5] The hearing is conducted before an evidentiary hearing committee, comprised of five members of the senior or active medical staff.[6] The practitioner may request to be represented by an attorney and/or may be accompanied by a member of the medical staff, and shall also be allowed to:

"(a) call and examine witnesses

(b) introduce exhibits

(c) cross-examine any witness on any matter relevant to the issues

(d) question the qualifications of any witness

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[5] According to the Fair Hearing Plan at Deaconess, a practitioner is entitled to an evidentiary hearing for the following recommendations or actions:

"(a) Denial of initial staff appointment
(b) Denial of reappointment
(c) Suspension of staff membership
(d) Revocation of staff membership
(e) Denial of requested advancement in staff category
(f) A change in staff category not acceptable to the practitioner
(g) Limitation of the right to admit patients
(h) Denial of requested department/service/section affiliation
(i) Denial of requested clinical privileges
(j) Reduction of clinical privileges
(k) Suspension of clinical privileges
(l) Revocation of clinical privileges
(m) Terms of probation
(n) Individual requirement of consultation

[6] The five hearing committee members are appointed by the president of the medical staff when the hearing is occasioned by an adverse recommendation of the Medical Staff Executive Council. On the other hand, when the hearing is occasioned by an adverse recommendation of the governing hospital board, the board president appoints the five members of the hearing committee.

(e) rebut any evidence

(f) request that the record of the hearing be made by use of a court reporter or an electronic recording unit."

At a hearing to review the revocation of a practitioner's clinical privileges, "the body whose adverse recommendation or action occasioned the hearing shall have the initial obligation to present evidence" in support of its recommendation. According to the Fair Hearing Plan at Deaconess, the burden then shifts to the practitioner to show "by a preponderance of the evidence that the grounds [for revocation] lack any substantial basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable, or capricious." Following this hearing, the committee compiles its findings and submits them along with a recommendation to either the Medical Staff Executive Council or the Board of Directors, depending upon which body initiated the adverse recommendation or action. After reviewing the committee's findings and recommendation, the council or hospital board affirms, modifies, or reverses the recommendation. If the decision is adverse to the practitioner, he has a right of review before the joint conference committee of the hospital. The Fair Hearing Plan at Deaconess provides that "[t]he practitioner seeking the review may submit a written statement detailing the findings of fact, conclusions and procedural matters with which he disagrees, and his reasons for disagreement." Following submission of the practitioner's statement, the joint conference committee conducts a review hearing and based upon its findings, recommends to the hospital board that the adverse decision be affirmed, modified, or reversed. The board issues a final written decision and if the practitioner's hospital staff privileges are, in fact, revoked, he is entitled to appeal that decision through the Indiana state court system and challenge the "good faith" of the hospital staff members in reaching their conclusion. *See, e.g., Kiracofe v. Reid Memorial Hosp.*, ____ Ind. App. ____, 461 N.E.2d 1134, 1139-41 (1984); *Yarnell v. Sisters of St.*

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Francis Hlth. Serv., ____ Ind. App. ____, 446 N.E.2d 359, 361-63 (1983).[7]

In July 1982, before the Board of Directors at Deaconess had issued their final decision revoking Dr. Marrese's clinical privileges, the plaintiffs (Dr. Marrese and his solely owned company, Bone & Joint Surgeons, Inc.) filed suit in the United States District Court for the Northern District of Illinois against Interqual, Inc., Deaconess Hospital and its Board of Directors in their individual capacity, and members of the SAHC and Executive Committee at Deaconess, including seven doctors, one hospital administrator, and one attorney.[8] The suit alleged that the defendants had conspired to restrain trade in violation of the Sherman Act § 1, had monopolized the market for orthopedic and neurological spinal surgical procedures in Evansville, Indiana in violation of the Sherman Act § 2, and had violated 42 U.S.C. § 1983 by adopting an anticompetitive, unfair, and unconstitutional Fair Hearing Plan under color of the Indiana medical peer review statute, Ind. Code § 34-4-12.6-1 *et seq.*[9] According to the plaintiffs' first amended complaint, "[b]eginning in early 1978 and continuing thereafter to the present, the Defendants have engaged in an unlawful conspiracy to exclude DR. MARRESE from the Evansville, Indiana marketing area by falsely charging that he is unqualified to practice and compete therein." The complaint alleged that the defendants "formulat[ed] and effectuat[ed]" this conspiracy through their actions as members of or consultants to the hospital board, the SAHC, and the

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[7] We express no view concerning the defendants' "good faith" and/or "bad faith" in the present case, as that issue is not presently before the court.

[8] The record reveals that the plaintiffs filed their initial complaint in this action on July 12, 1982. Some two weeks later, on July 27, 1982, the plaintiffs filed their first amended complaint.

[9] The plaintiffs' first amended complaint also included a pendent state claim, alleging that the defendants' actions constituted a tortious interference with business relations.

Medical Staff Executive Council at Deaconess. The plaintiffs sought money damages for the alleged Federal antitrust violations and, pursuant to the Clayton Act § 16, 15 U.S.C. § 26, a permanent injunction restraining defendants from continuing to engage in Federal antitrust violations. In addition, the plaintiffs requested a permanent injunction "enjoining the President of the Medical Staff . . . from naming a committee to sit in review of the recommendation of the Executive Committee of the Medical Staff."

For purposes of establishing the district court's subject matter jurisdiction over the alleged violations of the Sherman Act §§ 1, 2, the plaintiffs claimed that the defendants' activities had a substantial and adverse effect upon interstate commerce. In support of this position, the plaintiffs alleged that:

> "Approximately 45% of the patients treated by DR. MARRESE travel from Western Kentucky and Southern Illinois into the State of Indiana and the vast majority of these patients are treated by DR. MARRESE at DEACONESS HOSPITAL. . . . In addition, DR. MARRESE is a team surgeon for an Illinois high school, and in this capacity has occasion to travel into the State of Illinois, treat injured athletes and when necessary brings them back to the DEACONESS HOSPITAL for the purpose of providing medical treatment for them. In the regular course of his treatment of both his interstate and in-state patients, Plaintiff, DR. MARRESE, through Plaintiff's Bone and Joint Surgeons, Inc. purchases medicine, equipment and related supplies from out-of-state purveyors, derives revenues from the Federal Health Care Program commonly known as Medicare and Medicaid as well as from private out-of-state insurance companies and pays management and accounting fees to various out-of-state consultants. The total amount of said out-of-state purchases, revenues, and fees exceed the sum of $500,000.00 [annually]."
>
> * * *

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> If Defendants' conspiracy is successful in its ultimate objective of driving DR. MARRESE from the Evansville, Indiana marketing area, he will . . . be unable to practice orthopedic medicine anywhere in the continental United States because of the cost of medical malpractice insurance, and because no other hospital could afford the risk of accepting DR. MARRESE on its staff."[10]

The plaintiffs further alleged that:

> "Approximately 25% of the HOSPITAL'S patients travel from Kentucky and Illinois to the HOSPITAL for the purpose of receiving medical and surgical care from its professional staff.
>
> The HOSPITAL'S regular billings with respect to said out-of-state patients are not less than TEN MILLION DOLLARS ($10,000,000.00) per year.
>
> The HOSPITAL also purchases medical supplies and equipment in an amount not less than FIVE MILLION DOLLARS ($5,000,000.00) per year from various out-of-state sources."

In February 1983, the district court dismissed the plaintiffs' first amended complaint in its entirety. The court found that:

> "With respect to interstate commerce, plaintiffs have alleged that Dr. Marrese treats people who travel in interstate commerce; that they purchase medicine and related supplies from out-of-state; that Dr. Marrese travels in interstate commerce as part of his business; and that they receive revenues from out-of-state sources such as insurance companies and Medicare."

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[10] The record before this court reveals that the plaintiffs' allegation of out-of-state purchases, revenues, and fees in excess of $500,000 refers to an annual sum.

Based upon these findings, the court ruled, *inter alia*, that:

> "Plaintiffs have not alleged what effect the defendants attempts to revoke Dr. Marrese's clinical privileges have had on the aspects of interstate commerce alleged. Other than generalized, conclusory allegations plaintiffs have failed to allege any substantial effect on interstate commerce.... Thus, because the court concludes that defendants' allegedly unlawful actions do not have a substantial effect on interstate commerce, [the plaintiffs' claims under the Sherman Act §§ 1, 2] must be dismissed for lack of subject matter jurisdiction."[11]

In March 1983, the plaintiffs filed a motion for reconsideration of the district court's order dismissing the first amended complaint and also filed a motion for leave to file a second amended complaint. The court denied both motions ruling that, "[m]any of the allegations in the Second Amended Complaint are identical to paragraphs in the First Amended Complaint. To the extent that there are differences between the two complaints, they are differences merely of degree not of substance."[12] On ap-

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[11] The court ruled that the plaintiffs' claim of an anticompetitive, unfair, and unconstitutional Fair Hearing Plan at Deaconess Hospital failed to allege sufficient "state action" to state a claim under 42 U.S.C. § 1983. The court further ruled that because the federal claims were dismissed, it no longer retained jurisdiction over the pendent state law claim. The plaintiffs do not appeal these decisions.

[12] The district court denied the plaintiffs' motion for leave to file a second amended complaint and thus that complaint was never made a part of the district court record. It is clear, however, that the judge received and reviewed a copy of the second amended complaint as did the defendants who filed a memorandum in opposition to the plaintiffs' motion for leave to file an amended complaint. On appeal, the plaintiffs have presented this court with a copy of the second amended complaint which alleges, in addition to the allegations of the first

(Footnote continued on following page)

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peal, the plaintiffs contend that the district court erred in dismissing the plaintiffs claims under the Sherman Act §§ 1, 2, for failure to allege a substantial and adverse effect upon interstate commerce.

II

The Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or com-

[12] *continued*

amended complaint, that:

> "Approximately 300 patients per year travel from Western Kentucky and Southern Illinois into the State of Indiana for treatment by DR. MARRESE. Each patient is seen by DR. MARRESE on six separate occasions for a total of approximately 1,800 visits per year by out-of-state patients into the State of Indiana from DR. MARRESE. These patients are billed approximately $1,000,000.00 per year by DR. MARRESE and approximately $10,000,000.00 by the HOSPITAL. . . . The vast majority of these patients are treated by DR. MARRESE at least once at the HOSPITAL and a large percentage of these cases involve complex spinal surgery. If DR. MARRESE's privileges at the HOSPITAL are terminated, these patients will not cross state lines into the State of Indiana for their medical treatment for they come to DR. MARRESE because of his superior expertise in spinal diagnosis and treatment."

The second amended complaint also alleges that Dr. Marrese had contracted to purchase a $500,000 computerized tomography body scanner from a New Jersey firm. Specifically, Dr. Marrese alleges that he had made a down payment on the machine, had arranged financing with a Missouri firm, and had entered into an agreement with an out-of-state physician, a "national expert in the field of computerized tomagraphy scanning," to read and interpret the specialized x-rays. Dr. Marrese claims that as a result of the defendants' alleged illegal conduct, he was forced to cancel the agreement to purchase the scanner, the financing arrangement, and the x-ray reading agreement with the out-of-state physician.

merce among the several States," 15 U.S.C. § 1 (1982), and also prohibits "monopoliz[ing] any part of the trade or commerce among the several States." 15 U.S.C. § 2 (1982). It is axiomatic that in pleading a cause of action under the Sherman Act §§ 1, 2, the plaintiff must adequately allege the jurisdictional requirement of interstate commerce. *See McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42 (1980) ("*McClain*"); *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 (1976) ("*Hospital Building Co.*"). Thus, the plaintiff's complaint must allege sufficient facts to establish that the defendant's alleged illegal conduct is "in interstate commerce" or has a "substantial and adverse effect" upon interstate commerce. *McLain*, 444 U.S. at 241-42; *Hospital Building Co.*, 425 U.S. at 743. One of the two threshold issues before this court is whether the plaintiffs in the instant case have alleged facts sufficient at the pleading stage of the proceeding to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act.[13]

We note at the outset that "[i]n reviewing the dismissal of a complaint, 'the . . . factual allegations of the complaint are taken as true.'" *Mid-America Reg. Bar. v. Will Cty. Carpenters*, 675 F.2d 881, 883 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982) (quoting *Ashbrook v. Hoffman*, 617 F.2d 474, 475 (7th Cir. 1980)). According to the plaintiffs' first amended complaint, approximately forty-

[13] The record reveals that at the pleading stage of this proceeding the defendants filed a motion to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. For purposes of the Sherman Act claims, the district court treated the defendants' motion as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and dismissed the claims. According to the Supreme Court in *Hospital Building Co.*, the jurisdictional requirement of interstate commerce may be analyzed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), "the critical inquiry is into the adequacy of the nexus between [defendants'] conduct and interstate commerce that is alleged in the complaint." 425 U.S. at 742 n.1.

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five percent of Dr. Marrese's patients travel from Illinois and Kentucky into Indiana for treatment.[14] The complaint alleges that the vast majority of these patients are treated at Deaconess Hospital in Evansville, Indiana. In addition, Dr. Marrese claims that he travels into Illinois to treat injured athletes, and when necessary, brings them to Deaconess Hospital for medical treatment. Dr. Marrese further claims that he purchases medicine, equipment, and related supplies from out-of-state purveyors, derives revenues from Medicare, Medicaid, and private out-of-state insurance companies, and pays management and accounting fees to out-of-state consultants. These out-of-state purchases, revenues, and fees allegedly exceed $500,000 annually. Moreover, according to the plaintiffs' first amended complaint, approximately twenty-five percent of the patients receiving medical and surgical care at Deaconess Hospital travel from Illinois and Kentucky, accounting for $10,000,000 in annual hospital billings. The complaint alleges that the hospital purchases approximately $5,000,000 in medical supplies and equipment annually, from out-of-state sources. Finally, Dr. Marrese claims that upon revocation of his clinical privileges at Deaconess, he will no longer be able to practice orthopedic medicine in Evansville, Indiana or anywhere in the United States because no hospital will be able to afford the risk of granting Dr. Marrese staff privileges. It is the plaintiffs' position that these allegations are sufficient, at the pleading stage of the proceeding, to establish a "substantial and adverse effect" upon interstate commerce, and thus satisfy the jurisdictional requirement of interstate commerce under the Sherman Act.

In *Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980), this court set forth the general rule that "medical practice *per se* and without more is a local activity. To bring it within reach of the [Federal] antitrust laws a substantial and adverse effect upon inter-

[14] Due to the fact that the plaintiffs' second amended complaint was never made a part of the district court record, this court limits its review to the plaintiffs' first amended complaint.

state commerce is requisite." 629 F.2d at 454 (citing *Polhemus v. American Medical Assn.*, 145 F.2d 357, 359 (10th Cir. 1944)). "As long as the restraint in question 'substantially and adversely affects interstate commerce,' the interstate commerce nexus required for Sherman Act coverage is established." *Hospital Building Co.*, 425 U.S. at 743 (citations omitted). According to the Supreme Court in *McLain*, the defendant's activities must "be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." 444 U.S. at 246 (citing *Hospital Building Co.*, 425 U.S. at 745). Though each case involves a unique set of facts, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Hospital Building Co.*, 425 U.S. at 743 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974)); *Williams v. St. Joseph Hospital*, 629 F.2d at 453 n.11; *Tiger Trash v. Browning-Ferris Industries, Inc.*, 560 F.2d 818, 825-26 (7th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978) (quoting *United States v. Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949)).

In *Hospital Building Co.*, the Supreme Court stated that "[a]n effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price." 425 U.S. at 745. According to the Court, if the allegations of the plaintiff's complaint "fairly claim that the alleged conspiracy, to the extent it is successful, will place 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce," that is sufficient, at the pleading stage of a proceeding, to establish a substantial effect upon interstate commerce under the Sherman Act. *Id.* at 746. This court has added that under the "substantial effect" test, "it is unnecessary for an antitrust plaintiff to allege the defendant 'had the purposeful goal of affecting interstate commerce' . . . or that 'the conspiracy threaten[s] the demise of out-of-state businesses or that the conspiracy affect[s] market prices.'" *Tiger Trash v. Browning-Ferris Industries, Inc.*, 560 F.2d

at 826 (brackets original) (quoting *Hospital Building Co.*, 425 U.S. at 745, 746) ("*Tiger Trash*").

Indeed, in *Tiger Trash*, the plaintiff alleged that the defendant, Browning-Ferris Industries ("BFI"), was attempting to monopolize the solid waste collection service of Evansville, Indiana and Henderson, Kentucky, in violation of the Sherman Act § 2. According to the undisputed facts, BFI was an Indiana corporation with twenty customer accounts in Henderson, Kentucky, comprising approximately five percent of BFI's total accounts. The Kentucky accounts produced annual revenues of $30,000 amounting to approximately three to four percent of the annual revenues produced by BFI's Evansville, Indiana accounts. In addition, BFI maintained $6,000 worth of equipment in Kentucky on a permanent basis and used another $100,000 worth of equipment within the state. On the issue of whether or not these facts were sufficient to satisfy the test of "substantial and adverse effect" upon interstate commerce, at the pleading stage of the proceeding, this court ruled that:

> "Plaintiff Tiger Trash may be able to prove that defendants' monopolization caused an effect on interstate commerce 'that is more than merely inconsequential.' *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1303 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). Since the relation of the alleged restraints to interstate commerce and their effect upon it are not 'clearly nonexistent' summary judgment for BFI Indiana was inappropriate.
>
> * * *
>
> What the proofs will show is another matter, but at least plaintiff must be permitted to show (if it can) that an interstate market, the Henderson-Evansville area, was being monopolized by defendants. *Hospital Building, supra*, 425 U.S. at 747 n.5"

Id. at 826. Similarly, the Supreme Court has stated that at the pleading stage of a proceeding:

> "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1202, 1205-1207, 1215-1224, 1228 (1969). This rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce."

McLain, 444 U.S. at 246. *See also Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1282 (7th Cir. 1983); *Williams v. St. Joseph Hospital*, 629 F.2d at 453-54.

Since the decisions in *Hospital Building Co.* and *McLain*, the Federal courts have embarked upon a new and vastly expanded interpretation of the interstate commerce requirement under the Sherman Act. As a result, the courts have been deluged with complaints alleging that a hospital's denial or revocation of a doctor's staff privileges constitutes a restraint of trade and/or an attempt to monopolize trade in violation of the Sherman Act §§ 1, 2. *See Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1362-63 (W.D. Pa. 1982); Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal. L. Rev. 595 (1982). A common element in these hospital staff denial or revocation cases is a threshold determination by the court of whether or not the doctor's complaint alleges facts sufficient to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. For example, in *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 721 F.2d 68 (3rd Cir. 1983) ("*Cardio-Medical*"), four cardiologists claimed that their denial of specialized staff privileges, preventing them from using advanced equipment at the defendant hospital, violated the Sherman Act §§ 1, 2. The plaintiffs alleged that twelve to fifteen percent of their patients were from out-of-state, and that these patients accounted for $100,000 in annual revenues. The

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plaintiffs further alleged that in the absence of the defendant's illegal activity, they would have another twelve to fifteen percent interstate patients, additional interstate revenues, and additional purchases of out-of-state medications. The court held that:

> "Interferences with the interstate travel of patients, the interstate payment of fees, and the interstate purchase of medication are well-recognized methods for demonstrating an effect on interstate commerce in antitrust litigation. We therefore conclude that plaintiffs' pleadings meet the jurisdictional requirements of the Sherman Act . . . ."

721 F.2d at 76 (citations omitted). In accord with the court's broad language in *Cardio-Medical*, Federal courts have relied upon the treatment of out-of-state patients, the receipt of Medicare, Medicaid, and out-of-state insurance funds, and the purchase of medicine, equipment, and medical supplies from out-of-state purveyors by the plaintiff doctor and/or the defendant hospital, to rule that the doctor's complaint satisfies the jurisdictional requirement of interstate commerce under the Sherman Act. *See, e.g., Weiss v. York Hospital*, Nos. 82-3507, 82-3580 & 82-3581, slip op. at 79-82, n.63 (3d Cir. September 27, 1984) (osteopath denied staff privileges); *Mishler v. St. Anthony's Hosp. Systems*, 694 F.2d 1225, 1227-28 (10th Cir. 1981) (neurosurgeon excluded from emergency room referral list); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 725 (10th Cir. 1981) (en banc) (pathologist denied staff privileges); *Stone v. William Beaumont Hospital*, 1983-2 Trade Cases 69,475, 69,479 (E.D. Mich. 1983) (cardiologist denied staff privileges); *Konik v. Champlain Val. Physicians Hosp. Med. Ctr.*, 561 F. Supp. 700, 709-10 (N.D.N.Y. 1983), *aff'd*, 733 F.2d 1007 (2nd Cir. 1984) (anesthesiologist denied use of hospital facilities); *Pontius v. Children's Hospital*, 552 F. Supp. at 1361-62; (cardiovascular surgeon denied reappointment to staff); *McElhinney v. Medical Protective Co.*, 549 F. Supp. 121, 127-28 (E.D. Ky. 1982) (surgeon denied reappointment to staff); *Pao v. Holy Redeemer Hospital*, 547 F. Supp. 484, 489-90 (E.D. Pa.

1982) (opthalmologist denied staff privileges); *Everhart v. Jane C. Stormont Hospital*, 1982-1 Trade Cases 73,895, 73,896 (D. Kan. 1982) (cardiovascular surgeon denied staff privileges); *Williams v. Kleaveland*, 534 F. Supp. 912, 918 (W.D. Mich. 1981) (doctor denied reappointment to staff); *McDonald v. St. Joseph's Hospital of Atlanta*, 524 F. Supp. 122, 126-30 (N.D. Ga. 1981) (urological surgeon denied staff privileges); *Robinson v. Magovern*, 521 F. Supp. 842, 876 (W.D. Pa. 1981), *aff'd without opinion*, 688 F.2d 824 (3rd Cir.), *cert. denied*, 103 S. Ct. 302 (1982) (thoracic surgeon denied staff privileges); *Malini v. Singleton & Associates*, 516 F. Supp. 440, 442-43 (S.D. Tex. 1981) (radiologist denied staff privileges); *Feldman v. Jackson Memorial Hospital*, 509 F. Supp. 815, 819-21 (S.D. Fla. 1981) (podiatrist denied membership on medical staff).[15]

In the instant case, the plaintiffs' first amended complaint alleges that Dr. Marrese treats out-of-state patients; purchases medicine, equipment, and medical supplies from out-of-state purveyors; derives revenues from Medicare, Medicaid, and out-of-state private insurance companies; and pays management and accounting fees to out-of-state consultants. The plaintiffs' complaint further alleges that the impending revocation of Dr. Marrese's clinical privileges at Deaconness will prevent him from practicing orthopedic medicine in Evansville, Indiana or anywhere in the United States. Based upon

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[15] We note that courts have also dismissed doctors' claims under the Sherman Act, for the denial or revocation of hospital staff privileges, due to the plaintiff doctors' failure to allege a sufficient interstate commerce nexus. *See Hayden v. Bracy*, No. 83-2401, slip op. at 8-9 (8th Cir. September 27, 1984); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 927-28 (2d Cir. 1983); *Capili v. Shott*, 620 F.2d 438, 439 (4th Cir. 1980) (per curiam); *Wolf v. Jane Phillips Episcopal-Memorial Med. Ctr.*, 513 F.2d 684, 687-88 (10th Cir. 1975); *Moles v. Morton F. Plant Hospital, Inc.*, 1980-1 Trade Cases 77,186, 77,189-90 (M.D. Fla. 1978), *aff'd without opinion*, 617 F.2d 293 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

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these allegations, and the Federal courts' expansive interpretation of the interstate commerce requirement under the Sherman Act, it may be that the plaintiffs can demonstrate a substantial and adverse effect upon interstate commerce as a matter of practical economics. At this point we cannot say beyond doubt that the plaintiffs will be unable to prove a set of facts that will establish this required effect upon interstate commerce.[16] It is true that at the time the plaintiffs filed their first amended complaint, Dr. Marrese's clinical privileges at Deaconess had not yet been revoked and thus, no substantial and adverse impact upon interstate commerce had yet occurred. The Supreme Court has stated, however, that jurisdiction is not defeated "by plaintiff's failure to quantify the adverse impact of defendant's conduct." *McLain*, 444 U.S. at 243.

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[16] In *Western Waste Service v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980), the Ninth Circuit interpreted *McLain* to mean "that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as *defendants'* business activities, independent of the violations, affected interstate commerce." 616 F.2d at 1097 (emphasis added). In *Crane v. Intermountain Health Care*, 637 F.2d at 724, the Tenth Circuit stated that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." In the instant case, we need not reach the issue of whether the plaintiffs could rely upon the interstate business activities of defendant, Deaconess Hospital, to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d at 1282 (this court does not find it necessary to choose between the various interpretations of *McLain*). Based upon the plaintiffs' allegations that Dr. Marrese treats out-of-state patients and has interstate purchases, revenues, and fees in excess of $500,000 annually, it may well be that the plaintiffs can demonstrate a substantial and adverse impact upon interstate commerce. *Accord Cardio-Medical Associates*, 721 F.2d at 76.

According to the Court, "[e]ven where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief." *Id.* In light of the expansive interpretation of the interstate commerce requirement under the Sherman Act, and the fact that the plaintiffs seek injunctive relief under the Clayton Act § 16, we hold that the plaintiffs' first amended complaint alleges facts sufficient at the pleading stage of the proceeding to establish the jurisdictional requirement of interstate commerce under the Sherman Act, thus satisfying one of the two threshold issues before this court.

We hasten to note that our analysis of the plaintiffs' first amended complaint does not end with a determination of this jurisdictional issue of interstate commerce under the Federal antitrust laws. Rather a thorough reading of the plaintiffs' complaint reveals that the defendants' alleged conspiracy to "exclude DR. MARRESE from the Evansville, Indiana marketing area" was formulated and effectuated through the defendants' actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council at Deaconess. Indeed, the complaint alleges that "[i]n formulating and effectuating their ... conspiracy to eliminate plaintiffs as competitors in the relevant market and particularly for patients treated at the HOSPITAL, defendants further specifically agreed and conspired" in February 1978, to conduct an internal audit of the "back" procedures, including lumbar laminectomies and spinal fusions, performed at Deaconess; in August 1980, to retain Interqual, Inc. to conduct an independent audit of Dr. Marrese's surgical "back" procedures; to recommend, based upon the findings of the Interqual audit, that Dr. Marrese's clinical privileges be revoked; and in April 1982, on behalf of the Medical Staff Executive Council, to adopt the recommendation that Dr. Marrese's clinical privileges at Deaconess be revoked. Thus, according to the plaintiffs' first amended complaint, the defendants' alleged illegal

conduct under the Sherman Act consists of their actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess be revoked. In effect, the plaintiffs' Federal antitrust lawsuit is an attack upon the defendants' overall conduct as participants in the medical peer review process at Deaconess Hospital and their motives in recommending that Dr. Marrese's clinical privileges be revoked.

In response to the allegations contained within the plaintiffs' first amended complaint, the focus of our analysis shifts to a review of the defendants' conduct in recommending that Dr. Marrese's clinical privileges be revoked. The plaintiffs' first amended complaint, dismissed in its entirety by the district court, clearly states that:

> "The professional staff of any hospital in the State of Indiana is *authorized*, pursuant to 31 [sic] Burns Indiana Statute 4-12-6(2)(c)(B) [Ind. Code 34-4-12.6-1(c)(2)] to establish a 'Peer Review Committee', which is a committee charged with the responsibility of evaluating the qualifications of professional health care providers at a hospital. DR. MARRESE is a 'professional health care provider' within the meaning of said statute.
>
> Defendant HOSPITAL attempted to implement the provisions of that statute on June 2, 1980 [sic] by adopting a 'Fair Hearing Plan'...."

(Emphasis added). As a result of the plaintiffs' factual assertions that Ind. Code § 34-4-12.6-1 authorizes hospitals to establish peer review committees to evaluate staff members' qualifications and that Deaconess Hospital acted to implement the provisions of that statute, we must consider the second threshold issue; whether the defendants' conduct is "clearly articulated and affirmatively expressed as [Indiana] state policy" and "actively supervised" by the State so as to be exempt from the Federal

antitrust laws under the doctrine of state action. *See Hoover v. Ronwin*, 104 S. Ct. 1989, 1995 (1984); *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 105 (1980) ("*California Liquor Dealers*"). Such an analysis at the pleading stage of the proceeding is proper because the state action doctrine provides an *exemption* from the Federal antitrust laws and, if applicable, allows for dismissal of the complaint. *See, e.g., Hoover v. Ronwin*, 104 S. Ct. at 1994; *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 613-21 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1198 (1983); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 274-76 (9th Cir. 1982).

We initially note that the district court, in dismissing the plaintiffs' first amended complaint, did not address the issue of state action. The general rule is that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Sharp v. Ford Motor Credit Co.*, 615 F.2d 423, 424 n.1 (7th Cir. 1980). It is clear, however, that the issue of state action has been addressed in the parties' briefs before this court and that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. at 121.[17] In the instant case the plaintiffs challenge the defendants' conduct and motives as participants in the medical peer review process at Deaconess Hospital. A review of the plaintiffs' complaint along with the parties' briefs and the relevant Indiana statutory law reveals that the medical peer review process in the State of Indiana was developed and enacted by the Indiana legislature to regulate and improve the quality of medical care within the state. *See* Ind. Code. §§ 16-10-1-1 *et seq.*, 25-22.5-2-1 *et seq.*, 34-4-12.6-1 *et seq.* This com-

[17] On August 10, 1984, the parties were ordered to furnish the court with supplemental briefs, analyzing the applicability of the "state action" doctrine in the present case. The plaintiffs and defendants each submitted a supplemental and a reply brief on this issue.

prehensive statutory scheme mandates hospital medical staffs to review the professional practices and procedures of hospital staff members, *see* Ind. Code § 16-10-1-6.5, and authorizes the formation of peer review committees to perform this review process, *see* Ind. Code § 34-4-12.61(c). In light of this comprehensive statutory scheme in the State of Indiana, the plaintiffs' allegation that Deaconess Hospital acted to implement the provisions of this statutory scheme, and the fact that the state action doctrine *exempts* conduct that is "clearly articulated and affirmatively expressed as state policy" and "actively supervised" by the State from the Federal antitrust laws, this court is "justified in resolving [the state action] issue not passed on below . . . ." *Singleton v. Wulff*, 428 U.S. at 121.

The doctrine of state action originated in *Parker v. Brown*, 317 U.S. 341 (1943) ("*Parker*"), where a raisin producer in the State of California challenged a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." 317 U.S. at 346. According to the Supreme Court, the program restricting the marketing of raisins in California:

> "derive[d] its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.* In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

Id. at 350-51 (emphasis added). *See also Hoover v. Ronwin*, 104 S. Ct. at 1995.

Since the seminal decision in *Parker*, the Supreme Court has further refined the doctrine of "state action." *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) (state bar association's enforcement of a minimum legal fee schedule not exempt under *Parker* because not compelled by state); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 591-92 (1976) (opinion of Stevens, J.) (private utility company's regulation of light bulbs, approved by state and required to be continued until new tariff is filed, not exempt under *Parker*); *Bates v. State Bar of Arizona*, 433 U.S. 350, 362-63 (1977) (enforcement of clearly articulated disciplinary rules by state supreme court, acting in its legislative capacity, exempt under *Parker*); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (opinion of Brennan, J.) (city's operation of electrical utility system exempt under *Parker* if state contemplated the action complained of when it authorized city to operate in that area); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (state board's enforcement of a clearly articulated, affirmatively expressed state regulation of automobile dealerships is exempt under *Parker*); *California Liquor Dealers*, 445 U.S. at 105-06 (wine wholesaler's enforcement of a clearly articulated state system for wine pricing is not exempt under *Parker* because the state neither establishes nor reviews the price schedules, nor regulates the terms of fair trade contracts); *Community Communications Co. v. Boulder*, 455 U.S. 40, 55 (1982) (municipality's enforcement of its cable television ordinance is not exempt under *Parker* because the state's position is one of mere neutrality respecting the municipality's actions). Most recently, the Court in *Hoover v. Ronwin*, reaffirmed its rationale in *Parker* that "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." 104 S. Ct. at 1995. The Court added that a "[c]loser analysis is required when the activity at issue is not directly that of the legislature . . .

but is carried out by others pursuant to state authorization." *Id.* It is "important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State." *Id. See also Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 413-15 (opinion of Brennan, J.); P. Areeda, *Antitrust Law* ¶ 212.3 at 53-54 (Supp. 1982). According to the Court:

> "If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. As a result, in cases involving the anti-competitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation. The Court also has found the degree to which the state legislature . . . supervises its representative to be relevant to the inquiry."

Hoover v. Ronwin, 104 S. Ct. at 1995 (citations omitted).[18] Thus, our review of the defendants' conduct in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess be revoked is guided by the Supreme Court decisions, which "establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; sec-

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[18] To satisfy the "clearly articulated and affirmatively expressed state policy" element of the state action doctrine, the state legislature must authorize the challenged activity and the legislature must intend to displace the Federal antitrust laws. *See* P. Areeda, *Antitrust Law* ¶ 212.3 at 53 (Supp. 1982). *See also Community Communications Co. v. Boulder*, 455 U.S. at 51-52; *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. at 415 (opinion of Brennan, J.). The state legislature's intent to displace the federal antitrust laws exists if the challenged restraint is a necessary consequence of engaging in the authorized activity. P. Areeda, *Antitrust Law*, *supra*, at 54. *See also HyBud Equip. Corp. v. City of Akron*, No. 83-3306, slip op. at 19 (6th Cir. August 24, 1984).

ond, the policy must be 'actively supervised' by the State itself." *California Liquor Dealers*, 445 U.S. at 105 (quoting *City of Lafayette v. Louisianna Power & Light Co.*, 435 U.S. at 410 (opinion of Brennan, J.)).

At the outset, we note the underlying rationale of *Parker* that "the state action doctrine is grounded in concepts of federalism and state sovereignty." *Hoover v. Ronwin*, 104 S. Ct. at 1998 n.24 (citing *Community Communications Co. v. Boulder*, 455 U.S. at 54). Indeed, "the *Parker* exemption reflects the federalism principle that we are a Nation of *States*," *Community Communications Co. v. Boulder*, 455 U.S. at 50 (emphasis original), and "under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," *Parker*, 317 U.S. at 351. This court's concern in resolving the state action issue is to preserve the principles of state sovereignty and federalism without disregarding the procompetitive, free enterprise values embodied in the Federal antitrust laws.[19] The presence of a clearly articulated and affirmatively expressed state policy, as well as active state supervision, reduces the "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy." *Bates v. State Bar of Arizona*, 433 U.S. at 362. Moreover, the active supervision requirement "ensures that state-federal conflict will be avoided in those areas in which the state has demonstrated its commitment to a program through its exercise of regulatory oversight." 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 213a at 73 (1978). We add that in the instant case, a further concern of this court is to promote the intended purpose of the Sherman Act as a "consumer welfare prescription." *NCAA v. Board of Re-*

[19] *See, e.g.*, S. Sachs, *Antitrust, The States, and The Professions*, 52 Antitrust L.J. 189, 191-92 (1983) (professional areas create a potential tension between Federal antitrust laws and states' legitimate interest in regulation); D. Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 Baylor L. R. 263, 289-92 (1979) (state action doctrine is an accommodation of potentially competing sovereigns).

gents of Univ. of Okla., 104 S. Ct. 2948, 2964 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)). *See also Indiana Federation of Dentists v. F.T.C.*, No. 83-1700, slip op. at 30 (October 11, 1984); R. Bork, *The Antitrust Paradox* 66 (1978); 21 Cong. Rec. 2455, 2456-63 (March 21, 1890) (statement of Sen. Sherman). The State of Indiana has developed and enacted a comprehensive statutory scheme of medical peer review to protect consumer welfare. Indeed, the State's medical peer review process ensures Indiana citizens of the highest quality of medical care, while protecting them from incompetent, unqualified medical treatment. It is within this framework that we analyze the comprehensive statutory scheme developed and enacted by the Indiana legislature to establish, regulate, and supervise the medical peer review process within the State.[20]

Our initial inquiry is whether the defendants' review of Dr. Marrese's surgical "back" procedures at Deaconess and the recommendation that his clinical privileges be revoked is conduct "clearly articulated and affirmatively

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[20] In the instant case, our state action analysis is, by necessity, limited to a review of the Indiana statutory scheme regulating the medical peer review process. We note, however, that peer review is mandated by Congress when medical services are paid for with Medicare, *see* 42 U.S.C. § 1395x(k),(r),(s) (1982), and/or Medicaid, *see* 42 U.S.C. § 1396a(a)(19),(26) (1982), funds, and also when hospitals seek certification for participation in the Medicare program by obtaining accreditation from the Joint Commission for the Accreditation of Hospitals, *see* 42 U.S.C. § 1395bb(a) (1982). It is clear that Congress, by mandating hospital staff members or members of the local medical society to participate in the peer review process, *see* 42 U.S.C. § 1395x(k)(2), accepts the potential anticompetitive effects of the medical peer review process in favor of quality medical care. *See* 49 Fed. Reg. 14977 (1984) (proposed rules to protect information of Peer Review Organizations); 49 Fed. Reg. 29026 (1984) (revised rules for Peer Review Organizations). *Cf. Pontius v. Children's Hospital*, 552 F. Supp. at 1376 (Congress has attempted to improve the process of peer review through the Peer Review Improvement Act, 42 U.S.C. §§ 1320c-1 *et seq.* (1984)).

expressed as [Indiana] state policy." The Indiana statutory scheme clearly mandates that:

> "The governing board of the hospital *shall* be the supreme authority in the hospital, responsible for . . . the appointment of members of the medical staff and the assignment of privileges to members of the medical staff with the advice and recommendations of the medical staff consistent with their individual training, experience, and other qualifications. The medical staff of a hospital shall be an organized group which . . . *shall* have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients . . . ."

Ind. Code § 16-10-1-6.5 (emphasis added).[21] To implement this review process, the statutory scheme provides that

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[21] Similarly, the administrative regulations of the Indiana Hospital Licensing Board provide that:

> "THE GOVERNING BODY. The governing board of the hospital shall be the supreme authority in the hospital, responsible for the management, operation, functioning, and control of the hospital. The Governing Body shall:
>
> * * *
>
> (g) Approve the bylaws, rules, and regulations of the Medical Staff and audit procedures or other measures used to assure quality of care.
>
> (h) Appoint members of the Medical Staff and assign privileges consistent with their individual training, experience, and other qualifications on a periodic basis (at least every two (2) years) with the advice and recommendations of the organized Medical Staff."

410 Ind. Adm. Code 15-1-5 (Cumm. Supp. 1983). Furthermore:

(Footnote continued on following page)

hospitals establish a peer review committee that shall have "the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint." Ind. Code § 34-4-12.6-1. The peer review committee must be organized, *inter alia*, " by the professional staff of a hospital" and a "majority of the members [must be] professional health care providers holding licenses in the stated profession of the committee." *Id.*

The plaintiffs admit that Deaconess Hospital has "attempted to implement the provisions" of Ind. Code 34-4-12.6-1 *et seq.* Additionally, the plaintiffs allege that the SAHC and the Executive Council at Deaconess were organized by the hospital and consisted of a majority of licensed doctors (seven doctors, one hospital adminis-

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[21] *continued*

"THE MEDICAL STAFF. (1) The Medical Staff of a hospital composed of two (2) or more physicians shall be an organized group which shall be responsible to the governing board for the clinical and scientific work of the hospital, advise regarding professional matters and policies to the governing board, or the board's designee, and shall have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients and the preventability of complications and deaths occurring in the hospital.

(2) The medical staff shall initiate and, with the approval of the Governing Body, adopt and periodically amend bylaws, rules, regulations, and policies which shall include, but need not be limited to, provisions for:

(a) Qualifications to be met for appointment to staff membership and for delineation of privileges.

(Footnote continued on following page)

trator, and one attorney). The record reveals that the medical staff at Deaconess Hospital has acted pursuant to Ind. Code § 34-4-12.6-1, to establish a peer review process that complies with the requirements of Ind. Code § 34-4-12.6-1(c). The State of Indiana has "clearly articulated and affirmatively expressed as state policy" that hospital medical staffs are to form peer review committees and that such committees are to review the quality and necessity of the care provided patients, to evaluate the qualifications of staff members, and review the merits of any recommendation against a staff member. Ind. Code §§ 16-10-1-6.5, 34-4-12.6-1. As a necessary and reasonable consequence of this state mandated medical peer review process, hospital staff members must review the medical treatments, diagnostic procedures, and surgical procedures of competing staff members and, when required, recommend the revocation of staff privileges. Thus, the defendants' conduct, as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his staff privileges be revoked, satisfies the first element of the *Parker* test. *See* Borsody & Tiano, *Peer Review and the Anti-Trust Laws: An Analysis and a Proposal*, 26 St. Louis U.L.J. 511, 514-15 (1982).

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[21] *continued*

* * *

(d)(1) Review of applications for staff membership, delineation of privileges, and recommendations on appointment to the Governing Body.

(2) Appeal of decisions regarding Medical Staff membership and privileges.

(3) Review and analysis, at regular stated intervals, of clinical performance, pathological reports, the completeness of medical records and of the enforcement of requirements related thereto, of infection control, of use of blood and blood-related elements, and of total patient care.

410 Ind. Adm. Code 15-1-7 (Cumm. Supp. 1983).

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We turn our attention to the second element of the *Parker* test, whether the State of Indiana "actively supervises" the medical peer review process. The Indiana statutory scheme provides that the Indiana Medical Licensing Board shall, *inter alia*, promulgate rules and regulations necessary for the licensing of doctors within the state and also "[a]dopt rules establishing standards for the competent practice of medicine or osteopathic medicine, or any other form of practice regulated by a limited license or permit issued [by the Board]." Ind. Code § 25-22.5-2-7(h) (1982). The Medical Licensing Board, created by the Indiana legislature, consists of five physicians, one osteopathic physician, and one lay member of the general public, all appointed by the Governor. The Board closely supervises the Indiana medical profession by requiring that every physician within the state biennially register and qualify for licensure by the Board. 844 Ind. Adm. Code 4-6-1 *et seq.* (Cumm. Supp. 1983). Pursuant to Ind. Code § 25-22.5-6-2.1, the Board is authorized to commence revocation proceedings to revoke or suspend the medical license of any practitioner who knowingly violates the rules of competent medical practice established and promulgated by the Board. In furtherance of this duty to regulate the Indiana medical profession, the Board reviews the communications, records, and determinations of hospital peer review committees. According to the Indiana statutory scheme:

> "Communications to, and the records and determinations of, a peer review committee may only be disclosed to the specific credentials committee of a hospital or other health facility, the disciplinary authority of the professional organization of which the professional health care provider under question is a member, or *the appropriate state board of registration and licensure* which the committee deems necessary for recommended disciplinary action . . . ."

Ind. Code § 34-4-12.6-2(b) (emphasis added).[22] Thus, the Indiana legislature has created the Indiana Medical Licensing Board as an official body of the State to promulgate and enforce standards of competent medical practice, regulate the licensing of doctors within the State, and review the confidential communications, records, and determinations of medical peer review committees. The examination of confidential peer review data and records is an essential element of the Board's function in regulating the medical profession and in assuring that the citizens of Indiana receive the highest quality of medical care.

In addition, the Indiana statutory scheme provides that the State Board of Health shall license and regulate hospitals within the State through the Hospital Licensing Council. Ind. Code §§ 16-10-1-1, 16-10-1-3. Pursuant to Ind. Code § 6-10-1-12, the Council shall promulgate rules and regulations pertaining to the proper operation and management of hospitals within the State, amend rules and regulations "for the establishment and maintenance of standards of hospitalization required for the efficient care of patients," and prescribe, through rules and regulations, "the minimum standards as to equipment and provision for the care of patients to which an institution must conform in order to operate lawfully as a hospital" within the State. The Hospital Licensing Council, just as the Medical Licensing Board, is a creature of the Indiana

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[22] Similarly, the Indiana legislature amended Ind. Code § 16-10-1-6.5, effective April 22, 1983, to require that:

> "The governing board shall report, in writing, to the Indiana medical licensing board the results and circumstances of any final, substantive, and adverse disciplinary action taken by the governing board regarding a physician on the medical staff, or an applicant for the medical staff, if the action results in voluntary or involuntary resignation, termination, nonappointment, revocation, or significant reduction of clinical privileges or staff membership."

Ind. Code Ann. § 16-10-1-6.5(b) (Burns Supp. 1983).

legislature and consists of one physician, one registered nurse, four hospital administrators, one member of the Indiana Department of Public Welfare, and one member of the State Board of Health, all appointed by the Governor. Ind. Code § 16-10-1-3. The Council continually reviews the operation of hospitals within the State and, based upon its compiled data, recommends to the State Board of Health whether or not a hospital qualifies for annual license renewal. Ind. Code § 16-10-1-9. According to the Indiana statutory scheme, representatives of the State Board of Health are required to review all hospitals within the state on a periodic basis, Ind. Code § 16-10-1-13, and the Hospital Licensing Council is authorized to employ field inspectors to inspect hospitals and "give advice, aid, and encouragement to such institutions, in maintaining high professional ideals and good care of patients." Ind. Code § 16-10-1-17. Pursuant to 410 Ind. Adm. Code 15-1-8(1)(c) (1979), these field inspectors are entitled to review the confidential minutes of meetings of the hospital board, the medical staff, and the medical staff peer review committees. Included within the confidential minutes of peer review meetings are records of staff membership applications, delineations of staff privileges, appeals of decisions regarding medical staff membership and privileges, and records of clinical performance and total patient care within the hospital. 410 Ind. Adm. Code 15-1-7(d), (f). Thus, the Hospital Licensing Council of the Indiana State Board of Health is an official body created by the Indiana legislature to promulgate and enforce the proper standards of hospital care and regulate the licensing and operation of hospitals within the State. As an integral part of its hospital inspection program, the Council reviews the confidential communications, records, and determinations of medical peer review committees, assuring Indiana citizens that hospital medical staffs are providing quality medical care while acting in accordance with approved medical standards.

In *California Liquor Dealers*, the Supreme Court analyzed the nature of the supervision that a state must

exercise over a nonsovereign state representative to satisfy the second element of the *Parker* test. In that case the State of California had a plan for wine pricing that constituted resale price maintenance in violation of the Sherman Act. The defendant, a wholesaler of California wines, argued that his enforcement of the wine pricing system was exempt from the Federal antitrust laws under the doctrine of state action. The Supreme Court held that the resale plan was "clearly articulated and affirmatively expressed as state policy" because "[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *California Liquor Dealers*, 445 U.S. at 105. The Court added, however, that the plan "does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts." *Id.* at 105-06.

As contrasted to the facts in *California Liquor Dealers*, the State of Indiana, through the Indiana Medical Licensing Board, enacts, promulgates, and enforces rules of competent medical practice within the State and reviews the confidential records of medical peer review committees to determine if further action is required. This Medical Licensing Board, acting on behalf of the State's interest in protecting the health and ensuring the safety of Indiana citizens, closely supervises the Indiana medical profession and with the assistance of medical peer review committees, regulates the licensing of physicians within the State. Moreover, the State of Indiana, through the Hospital Licensing Council, promulgates standards of proper hospital care, regulates the licensing of hospitals within the State, and, as an integral part of its hospital inspection program, reviews the confidential records of medical peer review committees. In light of the Medical Licensing Board's active supervision of the medical profession and the Hospital Licensing Council's active supervision of hospitals and their medical staffs, it is clear that the State of Indiana ensures its citizens of quality medical

care and "actively supervises" the medical peer review process within the State. Thus, the defendants' conduct, as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his staff privileges be revoked satisfies the second element of the *Parker* test.

Furthermore, the Indiana statutory scheme provides that:

> "The members of any medical staff committee organized for the purpose of conducting medical review, being retrospective and not a part of current patient care, shall have an absolute immunity from civil liability for communications made in committee meetings, and reports and recommendations made by the committee arising from deliberations by the committee to the governing board of the hospital or another duly authorized medical staff committee."

Ind. Code § 16-10-1-6.5.[23] Similarly, Ind. Code. § 34-4-12.6-3 provides that:

> "There shall be no liability on the part of, and no action of any nature shall arise against, the personnel of a peer review committee for any act, statement made in the confines of the committee, or proceeding thereof made in good faith in regard to evaluation of patient care

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[23] The Indiana legislature amended § 16-10-1-6.5, effective April 22, 1983, to provide that:

> "The governing board and its employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated, if such reports or actions are made in good faith and without malice."

Ind. Code Ann. § 16-10-1-6.5 (Burns Supp. 1983).

• • •

> The personnel of a peer review committee shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care . . . ."

This immunity from civil liability afforded members of the medical peer review process is in accord with the court's reasoning in *Pontius v. Children's Hospital*, that subjecting members of the peer review process to a Federal antitrust lawsuit will "chill the rights and obligations of physicians to participate in peer review." 552 F. Supp. at 1376. According to that court:

> "if *individual physicians*, who manage to overcome their traditional reluctance to testify about the professional conduct of a colleague, know that by so doing they risk incurring legal fees running into six figures and a trial of a duration measured in months, on the mere allegation that they have conspired to restrain trade, the discovery of incompetent physicians will be rendered extraordinarily difficult."

Id. at 1362 (emphasis original).

It is only logical that physicians within the State of Indiana, when presented with allegations of Federal antitrust violations and the threat of treble damages, will either dilute their peer review reports and cease recommending the revocation of a hospital staff member's privileges or will discontinue their participation in the state mandated and supervised peer review process. As a result, the very lifeline of the medical peer review process will be severed. Indeed, as the Supreme Court observed in *Hoover v. Ronwin*, with regard to the legal profession and a committee of State Bar Examiners, "[t]here can be no question that the threat of being sued for [treble] damages [under the Sherman Act] particularly where the issue turns on subjective intent or motive—will deter 'able citizens' from performing [an] essential public service." 104 S. Ct. at 2002 n.34. Similarly in the medical profession, the threat of a Federal antitrust lawsuit will compel able

and qualified physicians, with particular expertise in complex areas of medicine, to abdicate their participation in the medical peer review process. The overall effect will be to destroy the intended purpose of medical peer review; to assure Indiana citizens of quality medical care and protect them from incompetent, unqualified medical treatment.

In the context of an academic setting this court recently stated that:

> "the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications."

E.E.O.C. v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983). So too, peer review is essential to the very lifeblood and heartbeat of medical competency and quality medical care in the State of Indiana and throughout the nation. In furtherance of this policy, the Indiana statutory scheme provides that "a committee having the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider" shall be immune from any civil action arising from a determination made in good faith. Ind. Code §§ 34-4-12.6-1, 34-4-12.6-3. Though this immunity attaches only after a finding that the committee's determinations were made in good faith, the concept to be gleaned from Ind. Code §§ 16-10-1-6.5 *et seq.*, 34-4-12.6-1 *et seq.* is that the State of Indiana realizes the real threat of lawsuits arising from the revocation of hospital staff privileges and has acted to protect the personnel involved in the medical peer review process. This protection encourages competent and qualified physicians to participate in the medical peer review process, thus assuring the

citizens of Indiana that hospital medical staffs are competent, qualified, and practicing in accord with approved medical standards. The "good faith" immunity provision is an essential element of the state mandated and supervised peer review process in the State and, in conjunction with the other provisions of the comprehensive statutory scheme, it furthers the underlying policy of the Sherman Act to protect consumer welfare.

We further note that under the Indiana statutory scheme any practitioner investigated by a medical peer review committee shall receive the due process safeguard of an evidentiary hearing before any disclosure of the committee's findings. Pursuant to Ind. Code § 34-4-12.6-2:

> "Any professional health care provider under investigation shall be permitted at any time to see any records accumulated by a peer review committee pertaining to his personal practice and shall be offered the opportunity to appear before the peer review committee with adequate representation to hear all charges and findings concerning his practice and to offer rebuttal information, which shall be a part of the record before any disclosure of the charges and findings . . . ."

According to the Fair Hearing Plan at Deaconess, any practitioner adversely affected by a recommendation of the Medical Staff Executive Council has a right to an evidentiary hearing and, if necessary, a review before the joint conference committee of the hospital. The practitioner may request to be represented by an attorney and/or be accompanied by a member of the medical staff. In addition he shall be allowed to introduce evidence, examine witnesses, and be on record throughout the entire hearing process. Moreover, if the hospital board, upon completion of the hospital hearings, adopts the Medical Staff Executive Council's recommendation of suspension or revocation, the practitioner may appeal that final decision, challenge the hospital staff members' "good

faith" in reaching that decision, and challenge the Fair Hearing Plan on constitutional grounds, through the Indiana state court system. *See Kiracofe v. Reid Memorial Hosp.*, ____ Ind. App. ____, 461 N.E.2d at 1139-41; *Yarnell v. Sisters of St. Francis Hlth. Serv.*, ____ Ind. App. ____, 446 N.E.2d at 361-63. *See also, Renforth v. Fayette Memorial Hospital Ass'n.*, 178 Ind. 475, 489, 383 N.E.2d 368, 377 (1978) (en banc), *cert. denied*, 444 U.S. 930 (1979). In the instant case, it is clear that before his clinical privileges at Deaconess hospital are revoked, Dr. Marrese is entitled to the due process safeguards of a hearing and a review before the joint conference committee of the hospital. In the event that the hospital board adopts the recommendation of the Medical Staff Executive Council and revokes Dr. Marrese's clinical privileges, he is entitled to a complete review of that decision and all its proceedings within the Indiana state court system.

In light of the hearings provided by the Fair Hearing Plan at Deaconess, and the availability of the Indiana state courts to appeal an adverse decision of the hospital board, it is clear that the plaintiffs have a more than adequate forum to challenge the defendants' conduct and motives in reviewing Dr. Marrese's surgical procedures and in recommending that his clinical privileges at Deaconess be revoked. The plaintiffs' Federal antitrust lawsuit, attacking the defendants' conduct as members of the peer review process at Deaconess and challenging their motives in recommending that Dr. Marrese's clinical privileges be revoked, circumvents the hospital hearings and the state court review process in favor of a Federal forum. It is well recognized that "federal courts . . . are now straining under excessive caseloads." *Patsy v. Florida Board of Regents*, 457 U.S. 496, 517 (1982) (O'Connor, J., concurring). As a matter of judicial economy,[24] the

[24] We here note Judge Fairchild's separate view that judicial economy is irrelevant in this context. As he sees it, our decision

(Footnote continued on following page)

Federal courts must not be further burdened by complex antitrust litigation when the alleged illegal conduct is mandated and supervised by the state and, furthermore, the plaintiff is afforded the due process safeguards of hearings and state court review. Common sense dictates that a cause of action under the Sherman Act is not created every time a lawyer, accountant, or architect is denied partnership status in a national firm, a business executive is fired or denied a promotion by a national corporation, or a physician, surgeon, or specialist has hospital staff privileges denied or revoked. In the instant case, Dr. Marrese is entitled to challenge the defendants' motives and conduct in a hearing before the Deaconess medical staff, a review hearing before the joint conference committee of the hospital, and finally through proceedings in the Indiana state court system. Just as a disgruntled state bar applicant who is denied admission to a state bar has no cause of action under the Sherman Act against a state mandated and supervised bar review committee, *Hoover v. Ronwin*, 104 S. Ct. at 2001, Dr. Marrese has no cause of action under the Sherman Act against the defendants as participants in the state mandated and supervised medical peer review process. Instead, Dr. Marrese must challenge the defendants' conduct and motives through the proper forums; the hospital hearing committees and the Indiana state court system.

Finally, we note the proviso of the court in *Pontius v. Children's Hospital*, that:

> "If a physician, terminated from hospital privileges after receiving due process, is able to force the hospital to assume the burdens of an antitrust trial on the mere

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[24] *continued*

is an interpretation of the state action doctrine of Federal antitrust law. Our conclusion that the doctrine applies to the present situation does, of course, result in relieving the district court of this lawsuit, but in his view achievement of that result is not an appropriate consideration in reaching our conclusion.

No. 83-1581

> allegation that the hospital's decision was grounded on reasons violative of the Sherman Act, the ability of hospitals to regulate their medical staffs will be seriously impaired."

552 F. Supp. at 1362. The evident trend among an increasing number of state supreme courts is to find that a hospital's "failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable risk of unreasonable harm and [thus] a hospital has a duty to exercise due care in the selection of its medical staff." *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 723, 301 N.W.2d 156, 164 (Wis. 1981) and cases cited therein. *See also Vuciecevic v. MacNeal Memorial Hosp.*, 572 F. Supp. 1424, 1428 (N.D. Ill. 1983); Annot., 51 A.L.R. 3d 981 (1973). Indeed, according to the court in *Johnson v. Misericordia Community Hosp.*:

> " 'One of the hospital's primary functions is to screen its staff of physicians to "insure" that only competent physicians are allowed to practice in the hospital.'
>
> * * *
>
> Obviously, the promotion of quality care and treatment of patients requires hospitals to perform a thorough evaluation of medical staff applicants from the standpoint of professional competence, ethics, established reputation, and further, to periodically review the qualifications of its staff through a peer review or medical audit mechanism. Hospitals, like doctors, must, above all else, be concerned with the welfare of their patients and must establish basic procedures to prevent subjecting them to harm and injury by physicians and surgeons who fail to possess an adequate level of technical skill, competence and ethical principles."

99 Wis.2d at 732, 734-35, 301 N.W.2d at 168-70 (quoting *Ferguson v. Gonyaw*, 64 Mich. App. 685, 697, 236 N.W.2d 543, 550 (1976)). *Cf. Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1568 (1984) ("hospital's unquestioned right to exercise some control over the identity and the

number of doctors to whom it accords staff privileges").

In the instant case, the State of Indiana's comprehensive statutory scheme, mandating and supervising the medical peer review process, enables the hospitals to fulfill their common law duty of exercising due care in selecting and maintaining a qualified and competent medical staff and, as a result, assures Indiana citizens that medical practices and procedures within the State are being closely monitored and reviewed. An attack upon this state mandated and supervised peer review process, through the Federal antitrust laws, will compel able and qualified physicians to abdicate their participation in the review of hospital staff members. This, in turn, will destroy the medical peer review process and prevent hospitals from fulfilling their duty to provide patients with a competent medical staff. In addition, the expenses in time and money, incurred by hospitals and physicians in defending their actions, as members of the state mandated and supervised medical peer review process, against the Federal antitrust laws, will eventually be reflected in increased medical costs to the consumer. Accordingly, we are reluctant to further burden the Federal courts with a greater influx of complex antitrust litigation, when a state such as Indiana in the instant case, clearly articulates and affirmatively expresses a state policy mandating medical peer review; actively supervises peer review committees' communications, records, and determinations through the Medical Council; enacts legislation to assure an adversely affected practitioner that he will receive the due process safeguard of an evidentiary hearing within the hospital; and provides the adversely affected practitioner with a state court forum to challenge the conduct and motives of participants in the peer review process.

Based upon the foregoing analysis it is apparent that the State of Indiana has established a thorough peer review process to assure the citizens of Indiana that only competent and qualified physicians, who practice only approved methods of medical care, are licensed within the state. True, the members of a peer review committee, as trained experts in highly specialized fields of medicine, are

often in direct competition with the practitioner whom they are reviewing, and the committee's decision to revoke hospital staff privileges may conceivably have a "substantial and adverse effect" upon interstate commerce. Nonetheless, "we are a Nation of *States*" *Community Communications Co. v. Boulder*, 455 U.S. at 50 (emphasis original), and "under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," *Parker*, 317 U.S. at 351. "The Sherman Act . . . gives no hint that it was intended to restrain . . . official action directed by a state." *Parker*, 317 U.S. at 351. There is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or [its nonsovereign representatives] from activities directed by its legislature." *Id.* at 350-51. In fact, the purpose of the Sherman Act is to protect consumer welfare.

The State of Indiana has made a policy decision that the peer review process is necessary to protect the citizens of Indiana and promote consumer welfare. It runs contrary to the very concepts of state sovereignty and federalism for a Federal court to review the conduct of a peer review committee, under the guise of the Sherman Act, when the State of Indiana: mandates that hospital medical staffs review the quality and necessity of care provided patients; establishes a peer review process to assure for a competent medical staff throughout the State; immunizes members of a peer review committee, who act in good faith, from civil liability; creates a Medical Licensing Board and a Hospital Licensing Council to enforce rules of medical competence and review the actions of medical peer review committees; provides adversely affected practitioners with the due process safeguards of an evidentiary hearing; and provides adversely affected practitioners with a state court forum to challenge the conduct and motives of participants in the peer review process. In the instant case, the defendants' actions in reviewing Dr. Marrese's surgical procedures and in recommending that his clinical privileges be revoked are "clearly articulated and affirmatively expressed as state policy" and are "ac-

tively supervised" by the State. Thus, in light of the plaintiffs' allegations that the defendants alleged illegal conduct consists solely of their actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, acting within the Indiana medical peer review process, we hold that the defendants' actions are exempt from the Federal antitrust laws under the doctrine of state action.[25]

III

Accordingly, we affirm the district court's dismissal of the plaintiffs' complaint.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

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[25] We are cognizant of the district court's ruling that the plaintiffs did not allege sufficient "state action" to state a cause of action under 42 U.S.C. § 1983. The plaintiffs did not appeal the district court's dismissal of their claim under 42 U.S.C. § 1983 nor was this court presented with any argument on the issue. We note that the elements required for a cause of action under 42 U.S.C. § 1983, a "deprivation . . . caused by the exercise of some right or privilege created by the State" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) differ from the elements required for state action under *Parker*. We further note that the Fair Hearing Plan at Deaconess Hospital provides Dr. Marrese with the due process safeguard of an evidentiary hearing and, if necessary, a review hearing before the joint conference committee of the hospital. Moreover, if Dr. Maresse's clinical privileges at Deaconess are, in fact, revoked, the hospital's decision can be appealed through the Indiana state court system.

USCA 50234—Pandick Midwest, Inc., Chicago—11-6-84—450

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Argued March 29, 1984)

August 10, 1984

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

R. ANTHONY MARRESE, M.D. and BONE & JOINT SURGEONS, INC., *Plaintiffs-Appellants,*

No. 83-1581 *vs.*

INTERQUAL, INC., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 82 C 4296
George N. Leighton, *Judge.*

ORDER

The parties have adequately briefed the issue of whether the plaintiffs' complaint alleged sufficient facts to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. A second issue of law has been addressed in the briefs as to whether the defendants' conduct, as members of the medical peer review process in Indiana, is exempt from the Federal antitrust laws under the doctrine of state action. A majority of this panel has decided that additional briefing of this state action issue would be beneficial before a final decision is rendered.

Accordingly, IT IS ORDERED that the parties shall have 30 days from the date of this order to simultaneously submit their respective supplemental brief on the state action issue. Thereafter the parties shall have 15 days to simultaneously

submit a reply brief if they so desire. There will be no oral argument unless requested by the court.

The supplemental briefs shall address the issue of whether revocation of hospital staff privileges gives rise to a cause of action under the Sherman Act in light of Indiana's comprehensive statutory scheme regulating the medical peer review process. See Ind. Code §§ 16-10-1-1 *et seq.* 25-22.5-2-1 *et seq.* and 34-4-12.6-1 *et seq.* The briefs shall also fully discuss the issue of whether anticompetitive or other invidious motivation, as alleged in the plaintiffs' complaint, is relevant to the establishment of a Sherman Act cause of action in this case.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

December 27, 1984

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Senior Circuit Judge*

R. ANTHONY MARRESE, M.D., and BONE & JOINT SURGEONS, INC., *Plaintiffs-Appellants,*

No. 83-1581 *vs.*

INTERQUAL, INC., et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 82 C 4296
George N. Leighton, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Received
July 29, 1982
N. Stuart Cunningham
United States District Court

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

R. ANTHONY MARRESE, M.D., et al, *Plaintiffs,* v. INTERQUAL, INC., et al, *Defendants.*	No. 82 C 4296

NOTICE OF FILING

PLEASE TAKE NOTICE that, pursuant to Rule 15(a), Federal Rules of Civil Procedure, we caused to be filed with the Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, this 26th day of July, 1982, the attached First Amended Complaint.

R. ANTHONY MARRESE, M.D. and
BONE & JOINT SURGEONS, INC.

By: /s/ LANDESMAN & SCHWARTZ,
Landesman & Schwartz,
Their Attorneys

JOHN J. CASEY
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IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

R. ANTHONY MARRESE, M.D. and BONE & JOINT SURGEONS, INC., an Indiana corporation

Plaintiffs,

vs.

INTERQUAL, INCORPORATED, a Delaware corporation,

and

DEACONESS HOSPITAL, an Indiana not-for-profit corporation,

and

WILLIAM H. ALLEN, M.D., BRYANT A. BLOSS, M.D. THOMAS EVANS, M.D., AHMET K. PERCINEL, M.D., PEDRO DOMINQUEZ, M.D., SAM B. BAKER, M.D., KENNETH NACHTNEBEL, M.D., DAVID A. JOHNSON and JOHN RENDER,

and

C. LE ROY ANDERSON, DAVID L. BARNING, C. JACKSON BUSCHKILL, MRS. JEAN G. DREMSTEDT, GERALD M. FINNEY, PHILLIP J. GEIER, MELVIN L. KALLENBACH, WILLIAM L. KECK, ROBERT E. KOCH, WILLIAM D. POWELL, DONALD A. RAUSCH, BERNARD E. SCHNACKE, DONALD E. STEEDLY, D. W. VAUGHN, and JAMES W. VOGEL,

Defendants.

Civil Action

No. 82 C 4296

JURY DEMANDED

Action under Sherman Anti-Trust Act and Clayton Anti-Trust Act (15 U.S.C. § 1 et seq. and 15 U.S.C. § 15 et seq.), under The Civil Rights Act of 1871 (42 U.S.C. § 1982), and Pendant Jurisdiction—Tortious Interference with Business Relations.

FIRST AMENDED COMPLAINT

JURISDICTION, VENUE, PARTIES

1. This Court has jurisdiction over the subject matter of Counts I through IV of this suit under 28 U.S.C. § 1337(a). This suit is brought under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover treble damages and plaintiff's cost of suit, including reasonable attorney fees, and to obtain injunctive relief for defendant's continuing violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

2. This Court has jurisdiction over the subject matter of Count V of this suit under 28 U.S.C. §§ 1331 and 1343 and the Constitution of the United States. Count V is brought to redress the deprivation under color of state statutes, ordinances, regulations, custom or usage of rights, privileges and immunities secured by the Fourteenth Amendment to the United States Constitution, and by the Civil Rights Act of 1871, 42 U.S.C. § 1983 in that defendants have lately adopted an anticompetitive, unfair and unconstitutional so-called "Fair Hearing Plan" under color of the State of Indiana's peer review statute (34 Burns Ind. Stat. Ann. 4-12-6), which plan is designed to exclude plaintiff, DR. MARRESE, from the relevant local surgical market, and thus to deprive him of his constitutional and statutory right to pursue his licensed profession, by expelling him unless he can satisfy a panel selected by one of the conspirators that the charges against him lack any substantial factual basis.

3. Venue is properly laid in the Northern District of Illinois under 28 U.S.C. § 1391 in that Defendant, INTERQUAL, has its principal place of business in this District, conducted its audit with employees and independent contractors doing business in this District, communicated in and from this District with a number of other Defendants and otherwise performed various acts which lead to the recommendation to terminate DR. MARRESE'S clinical privileges at the HOSPITAL.

4. Plaintiff, BONE & JOINT SURGEONS, INC., is an Indiana corporation with its main office in Evansville, Indiana.

5. Plaintiff, R. ANTHONY MARRESE, M.D. hereinafter referred to as "DR. MARRESE") graduated first in his class from Loyola Stritch School of Medicine, and at the same time received a Masters of Science Degree in physiology from the Graduate School of Loyola University. He interned at The John Hopkins Hospital and did his residency in orthopedic surgery at the Northwestern University Group Hospitals. He is a Board-certified orthopedic surgeon residing in Evansville, Indiana, licensed to practice medicine in that state, as well as in the State of Illinois. He practices in all areas of orthopedic surgery and specializes in disorders of the spine as an employee of Plaintiff, BONE & JOINT SURGEONS, INC.

6. Approximately 45% of the patients treated by DR. MARRESE travel from Western Kentucky and Southern Illinois into the State of Indiana; and the vast majority of these patients are treated by DR. MARRESE at DEACONESS HOSPITAL. As part of his regular treatment of these out-of-state patients, DR. MARRESE has regular telephonic and other communications across state lines with these patients, their pharmacists and x-ray technicians. In addition, DR. MARRESE is a team surgeon for an Illinois high school, and in this capacity has occasion to travel into the State of Illinois, treat injured athletes and, when necessary, brings them back to the DEACONESS HOSPITAL for the purpose of providing medical treatment for them. In the regular course of his treatment of both his interstate and in-state patients, Plaintiff, DR. MARRESE, through Plaintiff's Bone and Joint Surgeons Inc. purchases medicine, equipment and related supplies from out-of-state purveyors, derives revenues from the Federal Health Care Program commonly known as Medicare and Medicaid as well as from private out-of-state insurance companies and pays management and accounting fees to various out-of-state consultants. The total amount of said out-of-state purchases, revenues, and fees exceed the summ of $500,000.00.

7. In addition to the medical procedures usually performed by orthopedic surgeons, DR. MARRESE, in the last five years, has performed a large number of complex spinal operations (including radiological, diagnostic and follow-up treatment) most of which he performed by using the operating room facilities of the DEACONESS HOSPITAL. In those situations where the patient had a previous lumbar procedure those operations can only be performed at the DEACONESS HOSPITAL since that HOSPITAL is the only one in Evansville with a "cell saver."

8. The Defendant, INTERQUAL, INC. (hereinafter referred to as "INTERQUAL") is a Delaware corporation with its principal place of business within the State of Illinois. It purports to offer expert inpartial medical audit services to various hospitals and other medical institutions throughout the United States. It falsely purported to perform such an audit of the medical procedures of Plaintiff, DR. MARRESE, as hereinafter described.

9. Defendant, DEACONESS HOSPITAL, (hereinafter referred to as the "HOSPITAL") is a not-for-profit health care facility incorporated in the State of Indiana and located in Evansville, Indiana. Evansville is at the apex of the so-called "tri-state area" where the HOSPITAL regularly serves patients from Southern Indiana, Western Kentucky and Southern Illinois. Approximately 25% of the HOSPITAL'S patients travel from Kentucky and Illinois to the HOSPITAL for the purpose of receiving medical and surgical care from its professional staff.

10. The HOSPITAL'S regular billings with respect to said out-of-state patients are not less than TEN MILLION DOLLARS ($10,000,000.00) per year.

11. The HOSPITAL also purchases medical supplies and equipment in an amount not less than FIVE MILLION DOLLARS ($5,000,000.00) per year from various out-of-state sources.

12. At all times herein concerned, there existed at Defendant HOSPITAL, two committees which undertook dealings with Plaintiff, DR. MARRESE; for purposes of clarity, these committees are herein described as follows:

(a) Special Ad Hoc Committee of the Medical Staff (hereinafter referred to as "SAHC"); and

(b) Executive Committee of the Medical Staff (hereinafter referred to as the "Executive Committee").

13. Defendant, WILLIAM H. ALLEN, M.D. (hereinafter referred to as "DR. ALLEN") is a resident of Evansville, Indiana, is a neurosurgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine patients in the Evansville, Indiana, marketing area. Since February, 1978, he has been either a member or chairman of the SAHC.

14. Defendant, BRYANT A. BLOSS, M.D. (hereinafter referred to as "DR. BLOSS") is a resident of Evansville, Indiana, is an orthopedic surgeon on the staff of the HOSPITAL, and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients in the Evansville, Indiana marketing area. In addition, since May, 1980, he has been a member of the SAHC.

15. Defendant, THOMAS EVANS, M.D. (hereinafter referred to as "DR. EVANS") is a resident of Henderson, Kentucky, is an orthopedic surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients from the Evansville, Indiana marketing area. In addition, since August, 1978, he has been a member of the SAHC.

16. Defendant, AHMET K. PERCINEL, M.D. (hereinafter referred to as "DR. PERCINEL") is a resident of Evansville, Indiana, is an orthopedic surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients from the

Evansville, Indiana, marketing area. In addition, since August 1978, he has been a member of the SAHC.

17. Defendant, PEDRO DOMINQUEZ, M.D., (hereinafter referred to as "DR. DOMINQUEZ") is a resident of Evansville, Indiana, is a neurological surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine patients from the Evansville, Indiana marketing area. In addition, since May, 1980, he has been a member of the SAHC.

18. Defendant, SAM B. BAKER, M.D. (hereinafter referred to as "DR. BAKER") is a resident of Evansville, Indiana, a Director of the HOSPITAL where he was until recently Chief of Radiology and President of the Medical Staff. In addition, at all times herein alleged, he has been a member of the SAHC and the Executive Committee. Furthermore, DR. BAKER attended SAHC meetings of February 1982 and March 22, 1982, and is a competitor of Plaintiff, DR. MARRESE for the delivery of radiological services in the Evansville, Indiana marketing area.

19. Defendant, DAVID A. JOHNSON, hereinafter referred to as "JOHNSON") is Administrator of the HOSPITAL and a member of SAHC and Executive Committee and attended the meetings of those committees in 1982.

20. Defendant, JOHN C. RENDER, (hereinafter referred to as "RENDER"), is a resident of Indianoplis, Indiana, and is the attorney for and a member of the SAHC and the Executive Committee.

21. Defendant, KENNETH NACHTNEBEL, M.D., (hereinafter referred to as "DR. NACHTNEBEL") is a resident of Evansville, Indiana and as of May 1, 1982, was President of the Medical Staff, a Director of the HOSPITAL, and a member of the Executive Committee.

22. Defendants, C. LEROY ANDERSON, DAVID L. BARNING, C. JACK BUSCHKILL, MRS. JEAN G. DREM-

STEDT, GERALD M. FINNEY, PHILLIP J. GEIER, ROBERT L. KOCH, WILLIAM D. POWELL, DONALD A. RAUSCH, BERNARD E. SCHNACKE, D. W. VAUGHN and JAMES W. VOGEL, are all residents of Evansville, Indiana, and are members of the Board of Directors of Defendant HOSPITAL.

23. Defendants, MELVIN L. KALLENBACH and DONALD E. STEEDLY, are residents of Newberg, Indiana, and Defendant, WILLIAM L. KECK, is a resident of Mr. Vernon, Indiana, and are also members of the Board of Directors of the HOSPITAL.

24. All of the Directors named herein have directly assisted and promoted the alleged conspiracy of the other Defendants by declining to take reasonable precautions to prevent the anti-competitive practices hereinafter enumerated.

25. As a result of defendants' continuing conspiracy and other action in violation of the federal antitrust as hereinafter fully described, interstate commerce relative to the providing of orthopedic, neurological spine surgical services at the HOSPITAL and in the HOSPITAL'S marketing area, has been and will continue to be substantially adversely affected in that, among other things, Defendants would perpetuate and reinforce a variety of restrictive, anti-competitive practices in the relevant market. DR. MARRESE is and has been the major opponent of such practices and defendants now seek to exclude him from the relevant market for that reason and because of the serious competition threat that he poses to them.

RELEVANT MARKET

26. The relevant market for purposes of the anti-trust counts of this Complaint is the market for orthopedic and neurological spinal surgical procedures performed in Evansville, Indiana.

COUNT I

1.-26. The allegations of paragraph 1 through 26 are hereby incorporated by reference.

27. Beginning in early 1978 and continuing thereafter to the present, the Defendants have engaged in an unlawful conspiracy to exclude DR. MARRESE from the Evansville, Indiana marketing area by falsely charging that he is unqualified to practice and compete therein.

28. Said conspiracy has consisted of, among other things, a continuing course of action among the individual medical defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, and the Defendant HOSPITAL, and its Administrator, Defendant JOHNSON, its attorney, Defendant RENDER and Defendant INTERQUAL, in attributing DR. MARRESE'S success in his medical practice to his willingness to perform large numbers of "inappropriate and unwarranted surgical procedures."

29. Said conspiracy was undertaken not only because of DR. MARRESE'S aforesaid success in attracting a number of patients that greatly exceeded the number attracted to any other orthopedic surgeons on the HOSPITAL'S staff, but also because DR. MARRESE refused to abide by a number of long-entrenced, anti-competitive trade practices within the aforesaid market.

30. One such practice is an apprenticeship system imposed upon all orthopedic surgeons first entering the Evansville, Indiana marketing area, but expecially upon those who enter from outside of the State of Indiana. In order to become a member of the Medical Staff at the HOSPITAL, this system dictates that an orthopedic surgeon first become "apprenticed" to an orthopedic surgeon on the staff of the HOSPITAL and

thereafter remain in his employ for an extended but undefined period of time without becoming a professional challenge to the employer.

31. DR. MARRESE was formerly thus "apprenticed" to Defendant BLOSS, but was discharged as soon as he showed signs of a willingness to compete with him.

32. Upon leaving the employ of DR. BLOSS, DR. MARRESE refused to withdraw as a staff member at the HOSPITAL and refused to become employed by or associated with another member of the medical staff of the HOSPITAL. Instead he went directly into competition with them, thus further offending the anticompetitive local tradition.

33. Another such anti-competitive trade practice is the refusal of orthopedic and neurological surgeons to accept patients who have been treated by other orthopedic surgeons in the market area, without specific approval and referral from those surgeons.

34. DR. MARRESE has also refused to conform to this trade practice and has, in fact, attracted considerable patient business from his competitors at the HOSPITAL in particular and in the relevant market in general.

35. Another such anti-competitive practice is the opposition of staff orthopedic and neurological surgeons and the HOSPITAL to the introduction of advanced, highly sophisticated diagnostic equipment by any orthopedic surgeon in his own office for his own use.

36. DR. MARRESE'S active competition also offended this practice when he made an initial deposit of $10,000.00 for the purchase of a $500,000.00 advanced computerized Tomography Body Scanner (known as "C. T. Scanner") for his exclusive office use which was perceived by defendants to be a serious threat to their own trade practice. This purchase has not been completed as of the date of this Complaint, due to the threatened termination of DR. MARRESE'S staff privileges.

37. The private acquisition of such an advanced diagnostic tool in conjunction with the continuation of his staff privileges, would automatically have placed DR. MARRESE at an even greater competitive advantage over the other members of the orthopedic, neurological and radiological staff of the HOSPITAL, as well as causing substantial loss of revenue to the HOSPITAL.

38. Another such anti-competitive trade practice has been the refusal of all orthopedic surgeons on the HOSPITAL'S staff to treat a patient of DR. MARRESE'S when DR. MARRESE was out of town even when the patient was in critical need of orthopedic services.

39. On information and belief, DR. MARRESE states that he has been attacked for doing "to may backs", and because his patients occupy a relatively large number of beds at the HOSPITAL, thus making it more difficult for Defendants' orthopedic and neurological surgeons to hospitalize their patients. He has also been attacked because of his diagnostic and surgical ability to correct a variety of complex spinal conditions that local competitor surgeons are unable to perform. Still another reason for the attack on DR. MARRESE is that he is in direct competition with local neurological surgeons for the performance of certain spinal procedures.

40. In formulating and effectuating their resulting conspiracy to eliminate plaintiffs as competitors in the relevant market and particularly for patients treated at the HOSPITAL, defendants further specifically agreed and conspired to perform the following acts:

(a) In February, 1978, defendant, ALLEN, a member of the Medical Staff of the HOSPITAL, recommended that an audit be conducted of "back" procedures performed at the HOSPITAL. It had previously been the practice at the HOSPITAL to have audits of this general sort performed by the Medical Audit Committee, and the

Executive Committee initially recommended that this audit be conducted by this Committee, of which DR. MARRESE was a member. However, subsequently, the audit was instead assigned to SAHC, a Committee headed by a urologist, Dr. Rabin. Dr. Rabin Immediately named defendants, ALLEN, EVANS and PERCINEL to that Committee.

(b) Although Plaintiffs are not now aware of the exact numbers involved, there were approximately three times as many lumbar laminectomies as spinal fusions performed at the HOSPITAL during the period in question. Nevertheless, the members of SAHC, knowing full well that DR. MARRESE performed the vast majority of spinal fusions, audited 50 lumbar laminectomies and 40 spinal fusions. Of the 40 spinal fusions audited, 32 were performed by DR. MARRESE and 8 by six other orthopedic surgeons.

(c) All of DR. MARRESE'S lumbar laminectomies were found to have been performed in accordance with the nationwide and areawide quality criteria. Notwithstanding that DR. MARRESE'S spinal fusions also met all nationwide and areawide quality criteria, SAHC, then consisting of defendants, ALLEN, BLOSS, EVANS and PERCINEL, elected to examine those audited cases by the arbitrary and restrictive criteria of what they considered to be "reasonable" grounds for performing such surgery and "reasonable" extents or levels of such surgery. Thus in 24 of DR. MARRESE'S 32 spinal fusions audited, the Committee questioned the appropriateness, but not the results of DR. MARRESE'S surgery.

(d) There was no objective basis for such findings; indeed in various of the cases that were audited, DR. MARRESE undertook the surgery because of continuing severe spinal problems experienced by patients, some of whom had been under the care of other competing

orthopedic and enurological surgeons, but had not had those problems corrected.

(e) During the course of the aforesaid audit, defendants concealed its existence from DR. MARRESE. Subsequently, upon its conclusion and without affording him an opportunity to respond, defendant, ALLEN, the then acting Chairman of the SAHC, officially recommended to the full medical staff that all of DR. MARRESE'S lumbar laminectomies and spinal fusion cases should be monitored, and all his cases which did not have a positive radiological finding should be subjected to a mandatory second opinion.

(f) In making this recommendation to the full medical staff, defendant, ALLEN, violated the provisions of the Indiana Peer Review Statute which provides that any health care provider under investigation be allowed to review all the data collected by the relevant committee and to offer rebuttal data before any outside disclosure or making of recommendations by the Committee.

(g) Following the aforesaid publication and negative recommendations by the SAHC, DR. MARRESE met with defendants, PERCINEL, ALLEN and EVANS on or about January 31, 1980, to discuss 24 of the 32 cases audited which had been criticized. At that meeting, only one case was reviewed and the records in that case themselves disclosed that it met all areawide and nationwide criteria.

(h) This discovery so angered the SAHC that defendant, ALLEN, appointed new members to that Committee including defendants, BLOSS and DOMINQUEZ. The SAHC then sent 8 of the 32 cases to an outside auditor for review. After reviewing these cases, the outside auditor stated that he could form no conclusion about DR. MARRESE, but instead recommended that not only DR. MAR-

RESE'S but all other orthopedic and neurological procedures performed at the HOSPITAL be sent for an outside audit for review by two auditors, one to be selected by DR. MARRESE and one to be selected by the HOSPITAL.

(i) However because of its desire to single out DR. MARRESE for punishment for his departures from the aforesaid anti-competitive practices, the HOSPITAL failed to act upon this recommendation.

41. Thereafter, in August, 1980, a proposal was made to require each staff member at the HOSPITAL to provide two alternate physicians in that member's sub-specialty, to attend a doctor's patients in the event of that doctor's absence. In immediate succession, at the end of the same month, every member of the orthopedic staff either resigned or refused DR. MARRESE'S request to serve as his alternate.

42. At approximately the same time that it became general knowledge that Plaintiffs intended to purchase a C. T. Scanner, the HOSPITAL, at the instigation of, and in conspiratorial combination with the individual members of the medical staff, instructed a member of the SAHC and the Medical Staff Executive Committee, Attorney John Render, a defendant herein, to contact defendant, INTERQUAL, a company engaged in the business of performing medical audits, with the express purpose of conducting a second audit on certain of plaintiff MARRESE'S lumbar laminectomies and spinal fusions, not previously subjected to audit.

43. Defendant, INTERQUAL, conducted an audit of 93 of DR. MARRESE'S procedures, 70 of which were lumbar procedures and 23 of which were cervical procedures.

44. In conducting this audit, defendant, INTERQUAL, reviewed only the facesheets, the history and physical examination, a limited number of x-ray reports, laboratory test results and discharge summaries. When the record reflected the

existence of other materials bearing upon the conclusions that had been drawn, defendant, INTERQUAL, did not request this material. When abnormalities were noted in the body of an x-ray report, INTERQUAL disregarded that information. When additional x-rays and diagnostic tests were performed outside of the hospital and this was reflected in the material in their possession, defendant, INTERQUAL, did not request an opportunity to review that information. Defendant, INTERQUAL, made no attempt to read myleograms, misread myleogram reports, failed to secure other reports suggested "Fourth Generation C. T. scans when such procedures were not technically available during the time period in question, and submitted a report that contained so many clerical and interpretative errors that it reflects a total lack of good faith and malice towards Plaintiffs.

45. Defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, RENDER, and JOHNSON, as members of the SAHC, have now made the finding of INTERQUAL the basis for their recommendation to the Executive Committee of the medical staff to revoke the clinical privileges of DR. MARRESE at the HOSPITAL. This unquestioned adoption of the INTERQUAL report by the Executive Committee in conjunction with the other conduct enumerated herein exhibits a complete lack of good faith on the part of the Committee members and malice towards the Plaintiffs.

46. On April 28, 1982, the Executive Committee adopted the recommendation of the SAHC but stayed the termination of DR. MARRESE'S clinical privileges pending the hearing called for in the HOSPITAL'S "Fair Hearing Plan."

47. The attempt to exclude DR. MARRESE from staff privileges at the HOSPITAL and from providing medical services to his patients in the Evansville, Indiana marketing area, has been motived by his competitors' malice directed toward his aggressive competitive actions, his treatment of former patients of other staff members without prior referral

from them, his development of a successful independent medical practice, his refusal to remain employed by or associated with other area orthopedic surgeons, his refusal to resigh his staff privileges, and his refusal to abide by various other anti-competitive trade practices at the HOSPITAL.

48. On information and belief, some of those same competitors, the defendant doctors, have likewise conspired to exclude DR. MARRESE from the American Academy of Orthopedic Surgeons, thus further injuring him and impairing his practice.

DAMAGES

49. As a direct and proximate result of defendants' conspiracy, DR. MARRESE has suffered a severe professional stigma accompanied by a loss in patient referrals from other physicians and the nursing staff at the HOSPITAL. This total loss of profits from these sources alone over the past four years has been not less than $1,500,000.00.

50. If Defendants' conspiracy is successful in its ultimate objective of driving DR. MARRESE from the Evansville, Indiana marketing area, he will lose the entire accumulated good will of his present practice, his recognition as an able orthopedic surgeon and in his sub-specialty of spinal surgery, and be unable to practice orthopedic medicine anywhere else in the United States because of the cost of medical malpractice insurance, and because no other hospital could afford the risk of accepting DR. MARRESE on its staff. The damage to DR. MARRESE, therefore, will represent not less than $15,000,000.00 over the estimated remainder of his professional career.

WHEREFORE, Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter judgment against all of the Defendants and each of them, for three

times the total of the above amounts together wih all costs of this action, including reasonable attorney's fees.

COUNT II

1.-50. The allegations of Paragraphs 1 through 50 are hereby incorporated by reference.

51. The exact amount of DR. MARRESSE'S future damages in the event that the aforesaid conspiracy is fully successful cannot presently be determined. However, his injury will be grave and irreparable. No money damages can ever fully compensate him for this threatened, lifelong professional disgrace.

WHEREFORE, pursuant to § 16 of the Clayton Act (12 U.S.C. § 26) Plaintiffs, DR. MARRESE and BONE & Joint SURGEONS, INC., pray that this Court enter a permanent injunction restraining defendants and each of them from all of the aforesaid continuing anti-trust violations, and that it grant them such other and further relief as it may deem just and proper, together with all costs of this action, including reasonable attorney's fees.

COUNT III

1.-50. The allegations of Paragraphs 1 through 50 of Count II are hereby incorporated by reference.

52. Defendants' acts and conspiracy as above described have constituted an attempt and conspiracy to monopolize the aforesaid market for the delivery of orthopedic and neurological spinal surgical procedures. They have done so by taking, threatening to take, condoning and assisting the taking of exclusionary action against all competitors who are seen as competitively "agressive".

53. More than 40% of all the orthopedic and neurological surgical operations performed in Evansville during each of the past four years were performed at the HOSPITAL by member of its professional staff.

54. The HOSPITAL possesses unique and indispensable facilities for the sorts of complex, specialized operations that comprise the relevant service market as above defined. It is, therefore, a distinct submarket within that market and an "essential" facility to which every competitor must have fair and equal access in order to compete effectively.

55. Moreover, immediately upon the termination of his clinical privileges at defendant HOSPITAL, all other hospitals in the Evansville, Indiana marketing area at which DR. MARRESE is presently affiliated, will also be required to terminate his staff privileges since their malpractice carriers will provide no coverage for DR. MARRESE'S procedures.

56. The intent and natural effect of the aforesaid anticompetitive practices directed against any competitor who, like DR. MARRESE, is seen as "aggressive" in seeking to take professional business from any other competitors is to reduce the overall level of output of the relevant services in the relevant market.

WHEREFORE, pursuant t § 4 of the Clayton Act (15 U.S.C. § 15) Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray for the same relief sought with respect to Count I.

COUNT IV

1.-51. Plaintiff hereby realleges Paragraphs 1 through 51 of Count II as Paragraphs 1 through 54 of this Count IV.

WHEREFORE, pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26) Plaintiffs, DR. MARRESE and BONE &

JOINT SURGEONS, INC., pray that this Court enter a Permanent Injunction and restraining defendants and each of them from all of the aforesaid continuing antitrust violations, and that it grant them such other and further relief as it may deem just and proper, together with all costs of this action including reasonable attorney's fees.

COUNT V

(CIVIL RIGHTS ACTION)

1.-50. The allegations of Paragraphs 1 through 50 of Count II are hereby incorporated by reference.

51. The professional staff of any hospital in the State of Indiana is authorized, pursuant to 31 Burns Indiana Statute 4-12-6(2) (c) (B) to establish a "Peer Review Committee", which is a committee charged with the responsibility of evaluating the qualifications of professional health care providers at a hospital. DR. MARRESE is a "professional health care provider" within the meaning of said statute.

52. Defendant HOSPITAL attempted to implement the provisions of that statute on June 2, 1980 by adopting a "Fair Hearing Plan", a copy of which is attached hereto as Exhibit "A".

53. The plan adopted calls for two hearings, one being an Evidentiary hearing and one being an Appellate hearing in the event that any adverse action is taken by recommendation of the Medical Staff Executive Committee.

54. To date there has been no evidentiary hearing, but under the Fair Hearing Plan of defendant HOSPITAL, the President of the medical staff, after an adverse recommendation by the Executive Committee of the medical staff, is to appoint a hearing committee consisting of five (5) members of the senior or active medical staff of said hospital and to appoint a chairman of this hearing committee.

55. The President of the medical staff of defendant HOSPITAL is presently defendant NACHTNEBEL, who was a member of the Executive Committee of the medical staff, and voted in accordance with the actions of said Committee.

56. The Fair Hearing Plan adopted by defendant HOSPITAL provides, in part, as follows:

> "... the body whose adverse recommendation or action occasioned the hearing, shall have the initial obligation to present evidence in support thereof; but the practitioner shall thereafter be responsible for supporting his challenge to the adverse recommendation or action by preponderance of the evidence that the grounds therefore lack any substantial factual basis or that such basis or that the conclusions drawn therefrom are either arbitrary, unreasonable or capricious."

57. The "Fair Hearing Plan" adopted by defendant HOSPITAL is violative of plaintiff DR. MARRESE'S right to due process of law in that those judging his medical qualifications are selected by one who participated in the adverse recommendation in the first instance, thereby violating plaintiff's rights to procedural due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

58. The "Fair Hearing Plan" adopted by defendant HOSPTIAL also denied plaintiff's right to substinative due process of law in that the burden imposed upon him of showing a lack of "any substantial factual basis" for the Executive Committee of the Medical Staff's recommendation or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable or capricious, creates a presumption strongly in favor of the recommendations of the medical staff, and one which creates a strong presumption of guilt in violation of the Fourteenth Amendment of the United States Constitution.

59. In addition to the Constitutional Violations enumberated above, the Fair Hearing Plan adopted by the HOSPITAL does not comply with the Indiana Peer Review Act.

WHEREFORE, Plaintiffs, R. ANTHONY MARRESE and BONE & JOINT SURGEONS, INC., pray:

1. That the Court declare the procedure whereby the President of the Medical Staff of defendant HOSPITAL is authorized to appoint a Hearing Committee, when the President of the Medical Staff has served on the Medical Executive Committee making the adverse recommendation, to be a violation of plaintiffs' constitutional rights and therefore void and of no effect.

2. That this Court declare the action of defendant HOSPITAL, wherein the burden of proof is being placed upon plaintiffs to show by a preponderance of the evidence that the recommendation of the Medical Executive Committee lacked any substantial factual basis, or that such basis or the conclusions drawn therefrom were either arbitrary, unreasonable or capricious, is violative of plaintiffs' constitutional rights, and therefore void and of no effect.

3. That a permanent injunction issue enjoining the President of the Medical Staff of the HOSPITAL from naming a committee to sit in review of the recommendation of the Executive Committee of the Medical Staff.

4. That a Preliminary Injunction issue restraining and enjoining defendant HOSPITAL from proceeding to a hearing on the issues raised by the Medical Executive Committee for so long as the burden of proof remains upon DR. MARRESE to show by a preponderance of the evidence that the grounds for that recommendation lack any substantial factual basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable or capricious.

5. That plaintiffs be granted a judgment in money damages against defendant HOSPITAL for the loss of income that they may suffer as a result of defendant's unconstitutional action towards them.

6. That plaintiffs, be awarded reasonable attorney's fees and cost of suit to be assessed against defendant HOSPITAL as required by law.

7. That plaintiffs be awarded such other and further equitable and legal relief as may be deemed just under the circumstances.

COUNT VI

PENDENT JURISDICTION—TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

1.-49. The allegations of Paragraphs 1 through 49 of Count II are hereby incorporated by reference.

50. Beginning at the time of their involvement as hereinbefore alleged, defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, JOHNSON, RENDER, INTERQUAL, INC. and the HOSPITAL, with full knowledge that plaintiff MARRESE'S staff privileges at defendant HOSPITAL constituted the foundation for both plaintiffs success in the business of delivering orthopedic, neurological and radiological medical services, did wrongfully and maliciously endeavor to cause plaintiff MARRESE'S staff privileges at the HOSPITAL to be terminated and did by their acts, as above enumerated, attempt to force plaintiff MARRESE to leave the town of Evansvill, Indiana.

51. That all of the acts alleged above were performed by these defendants with the sole design of injuring plaintiffs and destroying their business and not for the purpose of serving any legitimate interest.

52. As a direct and proximate result of defendants' conduct, DR. MARRESE has suffered a severe professional stigma accompanied by a loss in patient referrals from other physicians as well as the nursing staff of the HOSPITAL. This

total loss of profit from these sources alone over the past four years has been no less than $1,500,000.00.

53. If defendants' efforts are successful in their ultimate objective of causing plaintiff MARRESE'S staff privileges at the HOSPITAL to be terminated and in forcing DR. MARRESE to leave the Evansville, Indiana marketing area, he will lose the entire accumulated goodwill of his present practice, his recognition as a competent orthopedic surgeon in all areas of that practice, and particularly in his subspecialty of spinal surgery, and be unable to practice orthopedic medicine anywhere in the United States because of the cost of medical malpractice insurance and because no other hospital could afford the risk of accepting DR. MARRESE on its staff. The damage to DR. MARRESE, therefore, would represent no less than $15,000,000.00 over the estimated remainder of his professional career.

WHEREFORE, plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter judgment against defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, JOHNSON, RENDER, INTERQUAL, INC. and HOSPITAL and each of them for $16,500,000.00 together with costs of this action.

COUNT VII

1.-53. The allegations of Paragraphs 1 through 53 of Count VI are hereby incorporated by reference.

54. The exact amount of plaintiffs' future damages in the event that the acts enumberated above performed by defendants are fully successful, cannot presently be determined. However, his injury will be grave and irreparable. No money damages can ever fully compensate him for his threatened termination of his clinical privileges and his lifelong professional disgrace.

WHEREFORE, plaintiffs. DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter a Permanent Injunction restraining said defendants and each of them from all of the aforesaid acts and that it grant them such other and further relief as it may deem just and proper, together with all costs of this action.

R. ANTHONY MARRESE, M.D. and
BONE & JOINT SURGEONS, INC.

By: /s/ JOHN J. CASEY
John J. Casey
One of Their Attorneys

JOHN J. CASEY
LANDESMAN & SCHWARTZ
111 W. Washington Street
Suite 1025
Chicago, Illinois 60602
(312) 346-6650

JURY DEMAND

I, John J. Casey, one of the attorneys for plaintiffs, R. ANTHONY MARRESE, M.D. and BONE & JOINT SURGEONS, INC., hereby demand a trial by jury on the issues listed in this Complaint.

/s/ JOHN J. CASEY
John J. Casey

JOHN J. CASEY
LANDSMAN & SCHWARTZ
Attorneys for Plaintiffs
111 W. Washington St.
Suite 1025
Chicago, Illinois 60602
(312) 346-6650

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS
COUNTY OF COOK } SS.:

JOHN J. CASEY, being first duly sworn on oath, deposes and says that he served the foregoing instrument upon:

SEE ATTACHED LIST

by mailing true and correct copies of the same this 26th day of July, 1982 and by depositing the said copies in the United States Mail at 111 W. Washington Street, Chicago, Illinois, 60602, postage prepaid, addressed as above shown.

/s/ JOHN J. CASEY
John J. Casey

SUBSCRIBED and SWORN to before me this 26th day of July, 1982.

/s/ Donna V. Sigma
Notary Public

JOHN J. CASEY
LANDESMAN & SCHWARTZ
111 West Washington Street
Suite 1025
Chicago, Illinois 60602
(312) 346-6650

EXHIBIT NO. A

FAIR HEARING PLAN

INTRODUCTION

It is the intent of the Medical Staff, by the adoption of this Fair Hearing Plan, to provide every practitioner with one evidentiary hearing and with one appellate hearing in the event that any action is taken by the Medical Staff Executive Council (hereafter MEC) or the Board of Directors of the Hospital. It is further the intention of the Medical Staff in adopting the Fair Hearing Plan that the practitioner be granted only one evidentiary hearing and one appellate hearing. It is intended that the provisions of the Plan following shall be initiated upon an adverse action of the MEC or the Board of Directors as the term adverse action is hereinafter defined. With respect to initial appointment, limitation of staff priviliges, revocation of staff privileges, or suspension or revocation of clinical privileges, as hereinafter specified, the MEC shall give the appropriate notice as hereinafter required to the practitioner. If, however, the adverse action is an action of the Board of Directors taken contrary to a favorable recommendation of the MEC, it is intended that the right to a fair hearing shall be enjoyed by an practitioner in the same manner as if such unfavorable or adverse action had been taken initially by the MEC.

ARTICLE I—INITIATION OF HEARING

1.1 RECOMMENDATIONS OR ACTIONS

The following recommendations or actions shall, if deemed adverse pursuant to Section 1.2 of this Plan, entitle the practitioner affected thereby to a hearing:

(a) Denial of initial staff appointment

(b) Denial of reappointment

(c) Suspension of staff membership

(d) Revocation of staff membership

(e) Denial of requested advancement in staff category

(f) A change in staff category not acceptable to the practitioner

(g) Limitation of the right to admit patients

(h) Denial of requested department/service/section affiliation

(i) Denial of requested clinical privileges

(j) Reduction in clinical privileges

(k) Suspension of clinical privileges

(l) Revocation of clinical privileges

(m) Terms of probation

(n) Individual requirement of consultation

1.2 WHEN DEEMED ADVERSE

A recommendation or action listed in Section 1.1 of this Plan shall be deemed adverse only when it has been:

(a) recommended by the medical executive committee (MEC); or

(b) taken by the board contrary to a favorable recommendation by the MEC under circumstances where no right to hearing existed; or

(c) taken by the board on its own initiative without benefits of a prior recommendation by the MEC.

1.3 NOTICE OF ADVERSE RECOMMENDATION OR ACTION

A practitioner against whom an adverse recommendation of action has been taken pursuant to Section 1.2 of this

Plan shall promptly be given special notice by certified mail of such action. Such notice shall:

(a) advise the practitioner of his right to a hearing pursuant to the provisions of the medical staff bylaws and of this Fair Hearing Plan.

(b) specify the number of days following the date of receipt of notice within which a request for a hearing must be submitted.

(c) state that failure to request a hearing within the specified time period shall constitute a waiver of rights to a hearing and to an appellate review on the matter.

(d) state that upon receipt of his hearing request, the practitioner will be notified of the date, time, and place of the hearing and the grounds upon which the adverse action is based.

1.4 REQUEST FOR HEARING

A practitioner shall have ten (10) days following his receipt of a notice pursuant to Section 1.3 to file a written request for a hearing. Such request shall be delivered to the chief executive officer either in person or by certified or registered mail.

1.5 WAIVER BY FAILURE TO REQUEST A HEARING

A practitioner who fails to request a hearing within the time and in the manner specified in Section 1.4 waives any right to such hearing and to any appellate review to which he might otherwise have been entitled. Such waiver in connection with:

(a) An adverse action by the board shall constitute acceptance of that action, which shall thereupon become effective as the final decision of the board.

(b) An adverse recommendation by the MEC shall constitute acceptance of that recommendation, which shall thereupon become and remain effective pending the final decision of the board. The board shall consider the committee's recommendation at its next regular meeting following waiver. In its deliberations, the board shall review all the information and material considered by the committee and may consider all other relevant information received from any source. If the board's action on the matter is in accord with the MEC's recommendation, such action shall constitute a final decision of the board. If the board's actions as the effect of changing the MEC's recommendation, the matter shall be submitted to the joint conference committee of the hospital for recommendation. The board's action on the matter following receipt of the joint conference recommendation shall constitute its final decision. The chief executive officer shall promptly send the practitioner special notice informing him of each action taken pursuant to this Section 1.5(b) and shall notify the president of the staff and the chairman of the MEC of each such action.

ARTICLE II—HEARING PREREQUISITES

2.1 NOTICE OF TIME AND PLACE FOR HEARING

Upon receipt of a timely request for hearing, the chief executive officer shall deliver such request to the president of the medical staff or to the board, depending on whose recommendation or action prompted the request for hearing. Within fifteen (15) days after receipt of such request, the president of the staff or the board shall schedule and arrange for a hearing. At least fifteen (15) days prior to the hearing, the chief executive officer shall send the

practitioner special notice of the time, place, and date of the hearing. The hearing date shall be not less than fifteen (15) days nor more than forty-five (45) days from the date of receipt of the request for hearing; provided, however, that a hearing for a practitioner who is under suspension then in effect shall be held as soon as the arrangements for it may reasonably be made, but not later than thirty (30) days from the date of receipt of the request for hearing.

2.2 STATEMENT OF ISSUES

The notice of the hearing required by Section 2.1 shall contain a concise statement of the reasons for the adverse action of the MEC or the board, whichever the case may be. It is intended that the practitioner shall be provided in reasonable detail with the underlying reasons and causes for the adverse action and that the notice of the hearing will contain specific enough reference to such reasons to permit the practitioner to adequately prepare for the evidentiary hearing.

2.3 APPOINTMENT OF HEARING COMMITTEE

2.3-1 BY MEDICAL STAFF

A hearing occasioned by an adverse MEC recommendation pursuant to Section 1.2(a) shall be conducted by a hearing committee appointed by the president of the medical staff and composed of five (5) members of the senior or active medical staff. One of the members so appointed shall be designated as chairman.

2.3-2 BY BOARD

A hearing occasioned by an adverse action of the board pursuant to Section 1.2(b) or (c) shall be conducted by a hearing committee appointed by the

president of the board and composed of five (5) members, all of whom shall be members of the senior or active medical staff of the Hospital. One of the appointees to the committee shall be designated as chairman.

2.3-3 SERVICE ON HEARING COMMITTEE

Whenever possible the members of the hearing committee selected either by the president of the medical staff or the president of the board, as aforesaid, shall be persons who have not participated in initiating or investigating the underlying matter at issue; and wherever possible, such persons shall not have been a member of any body whose adverse recommendation or action occasioned the hearing. It is recognized, however, that it is desirable that persons with particular knowledge of the general subject matter in issue be appointed to the hearing committee; for example, if the matter in issue relates to clinical performance, it is deemed advisable that the hearing committee at least to some extent be comprised of persons knowledgable in the clinical area involved in the particular hearing.

ARTICLE III—HEARING PROCEDURE

3.1 PERSONAL PRESENCE

The personal presence of the practitioner who requested the hearing shall be required. A practitioner who fails without good cause to appear and proceed at such hearing shall be deemed to have waived his rights in the same manner and with the same consequence as provided in Section 1.5.

3.2 PRESIDING OFFICER

The chairman of the hearing committee shall preside as the presiding officer at the hearing. The presiding officer shall act to maintain decorum and to assure that all participants in the hearing have a reasonable opportunity to present relevant oral and documentary evidence. He shall be entitled to determine the order of procedure and the admissability of evidence.

3.3 REPRESENTATION

The practitioner who requested the hearing shall be entitled to be accompanied and represented at the hearing by a member of the medical staff in good standing or by a member of his local medical society. The MEC or the board, depending on whose recommendation or action prompted the hearing, shall appoint an individual to present the facts in support of its adverse recommendation or action, and to examine witnesses. Representation of either party by an attorney at law shall be governed by the provisions of Section 8.1 of this Plan.

3.4 RIGHTS OF PARTIES

During a hearing, each of the parties shall have the right to:

(a) call and examine witnesses

(b) introduce exhibits

(c) cross-examine any witness on any matter relevant to the issues

(d) question the qualifications of any witness

(e) rebut any evidence

(f) request that the record of the hearing be made by use of a court reporter or an electronic recording unit

The practitioner who requested the hearing may be called and examined as if under cross-examination.

3.5 PROCEDURE AND EVIDENCE

The hearing need not be conducted strictly according to rules of law relating to the examination of witnesses or presentation of evidence. Any relevant matter upon which responsible persons customarily rely in the conduct of serious affairs shall be admitted, regardless of the admissibility of such evidence in a court of law. Each party shall, prior to or during the hearing, be entitled to submit memoranda concerning any issue of law or fact, and such memoranda shall become part of the hearing record. The presiding officer may, but shall not be required to, order that oral evidence be taken only on oath or affirmation administered by any person designated by him and entitled to notarize documents in the state where the hearing is held.

3.6 OFFICIAL NOTICE

In reaching a decision, the hearing committee may take official notice, either before or after submission of the matter for decision, of any generally accepted technical or scientific matter relating to the issues under consideration and of any facts that may be judicially noticed by the courts of the state where the hearing is held. Parties present at the hearing shall be informed of the matters to be noticed and those matters shall be noted in the hearing record. Any party shall be given opportunity, on timely request, to request that a matter be officially noticed and to refute the officially noticed matters by evidence or by written or oral presentation of authority, the manner of

such refutation to be determined by the hearing committee. The committee shall also be entitled to consider all other information that can be considered, pursuant to the medical staff bylaws, in connection with applications for appointment or reappointment to the medical staff and for clinical privileges.

3.7 BURDEN OF PROOF

When a hearing relates to Section 1.1(a), (e), (h), or (i), the practitioner who requested the hearing shall have the burden of proving, by clear and convincing evidence, that the adverse recommendation or action lacks any substantial factual basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable, or capricious. Otherwise, the body whose adverse recommendation or action occasioned the hearing shall have the initial obligation to present evidence in support thereof; but the practitioner shall thereafter be responsible for supporting his challenge to the adverse recommendation or action by preponderance of the evidence that the grounds therefor lack any substantial factual basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable, or capricious.

3.8 RECORD OF HEARING

A record of the hearing shall be kept that is of sufficient accuracy to permit an informed and valid judgment to be made by any group that may later be called upon to review the record and render a recommendation or decision in the matter. The hearing committee may select the method to be used for making the record, such as court reporter, electronic recording unit, detailed transcription, or minutes of the proceedings.

3.9 POSTPONENT

Requests for postponement of a hearing shall be granted by the chairman of the hearing committee only upon a

showing of good cause and only if the written request therefor is made as soon as is reasonably practical.

3.10 PRESENCE OF HEARING COMMITTEE MEMBERS AND VOTE

A majority of the hearing committee must be present throughout the hearing and deliberations. If a committee member is absent from substantial any part of the proceedings, he shall not be permitted to participate in the deliberations or the decision.

3.11 RECESSES AND ADJOURNMENT

The hearing committee may recess the hearing and recovene the same without additional notice for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon conclusion of the presentation of oral and written evidence, the hearing shall be closed. The hearing committee shall thereupon, at a time convenient to itself, conduct its deliberations outside the presence of the parties. Upon conclusion of its deliberations, the hearing shall be declared finally adjourned.

ARTICLE IV—HEARING COMMITTEE REPORT AND FURTHER ACTION

4.1 HEARINGS COMMITTEE REPORT

Within fifteen (15) days after final adjournment of the hearing, the hearing committee shall make a written report of its findings and recommendations in the matter and shall forward the same, together with the hearing record and all other documentation considered by it, to the body whose adverse recommendation or action occasioned the hearing. All findings and recommendations by the hearing

committee shall be supported by reference to the hearing record and the other documentation considered by it.

4.2 ACTION ON HEARING COMMITTEE REPORT

Within thirty (30) days after receipt of the report of the hearing committee, the MEC or the board, as the case may be, shall consider the same and affirm, modify, or reverse its recommendation or action in the matter. It shall transmit the result, together with the hearing record, the report of the hearing committee and all other documentation considered, to the chief executive officer.

4.3 NOTICE AND EFFECT OF RESULT

4.3-1 NOTICE

The chief executive officer shall promptly send a notice by certified mail to the practitioner informing him of the result of the action of the MEC and shall also send such notice to the president of the medical staff, chairman of the MEC, and the board.

4.3-2 EFFECT OF FAVORABLE RESULT

(a) *Adopted by the Board:* If the board's result pursuant to Section 4.2 is favorable to the practitioner, such result shall become the final decision of the board and the matter shall be considered finally closed.

(b) *Adopted by the MEC:* If the MEC's result is favorable to the practitioner, the chief execution officer shall promptly forward it, together with all supporting documentation, to the board for its final action. The board shall take action thereon by adopting or rejecting the MEC's result in whole or in part, or by referring the matter back to the MEC for further reconsideration. Any such referral back shall

state the reasons therefor, set a reasonable time limit within which a subsequent recommendation to the board must be made, and may include a directive that an additional hearing be conducted to clarify issues that are in doubt. After receipt of such subsequent recommendation and any new evidence in the matter, the board shall take final action. The chief executive officer shall promptly send the practitioner notice by certified mail informing him of each action taken pursuant to this section 4.3(b). Favorable action shall become the final decision of the board, and the matter shall be considered finally closed. If the board's action is adverse in any of the respects listed in Section 1.1 of this Plan, the special notice shall inform the practitioner of his right to request an appellate review by the board as provided in Section 5.1 of this Plan.

4.3-3 EFFECT OF ADVERSE RESULT

If the result of the MEC or of the board continues to be adverse to the practitioner in any of the respects listed in Section 1.1 of this Plan, the special notice required by Section 4.3-1 shall inform the practitioner of his right to request an appellate review by the board as provided in Section 5.1 of this Plan.

ARTICLE V—INITIATION AND PREREQUISITES OF APPELLATE REVIEW

5.1 REQUEST FOR APPELLATE REVIEW

A practitioner shall have ten (10) days following his receipt of a notice pursuant to Section 4.3-2(b) or 4.3-3 to file a written request for an appellate review. Such request

shall be delivered to the chief executive officer either in person or by certified or registered mail and may include a request for a copy of the report and record of the hearing committee and all other material, favorable or unfavorable, if not previously forwarded, that was considered in making the adverse action or result.

5.2 WAVIER BY FAILURE TO REQUEST APPELLATE REVIEW

A practitioner who fails to request an appellate review within the time and in the manner specified in Section 5.1 above waives any right to such review. Such waiver shall have the same force and effect as that provided in Section 1.5 of this plan.

5.3 NOTICE OF TIME AND PLACE FOR APPELLATE REVIEW

Upon receipt of a timely request for appellate review, the chief executive officer shall deliver such request to the chairman of the board. As soon as practicable, the chairman of the board shall schedule and arrange for an appellate review request; provided, however, that an appellate review for a practitioner who is under a suspension then in effect shall be held as soon as the arrangements for it may reasonably be made, but not later than fifteen (15) days from the date of receipt of the request for review. At least ten (10) days prior to the appellate review, the chief executive officer shall send the practitioner special notice of the time, place, and date of the review. The time for the appellate review may be extended by the appellate review body for good cause and if the written request therefor is made as soon as is reasonably practical.

5.4 APPELLATE REVIEW BODY

The appellate review body shall consist of the joint conference committee of the hospital as it is constituted at

the time of the request for the appellate review. If any of the physician members of the appellate review body shall have been members of the hearing committee, such person shall not be eligible to serve on the appellate review committee. In such case, the president of the medical staff shall designate another member of the medical staff to serve on the appellate review body in place of the individual who was disqualified by reason of serving on the hearing committee. The person so selected by the president of the medical staff shall not have been a member of the hearing committee.

ARTICLE VI—APPELLATE REVIEW PROCEDURE

6.1 NATURE OF PROCEEDINGS

The proceedings by the review body shall be in the nature of an appellate review based upon the record of the hearing before the hearing committee, that committee's report, and all subsequent results and actions thereon. The appellate review body shall also consider the written statements, if any, submitted pursuant to Section 6.2 of this Plan and such other material as may be presented and accepted under Sections 6.4 and 6.5 of this Plan.

6.2 WRITTEN STATEMENTS

The practitioner seeking the review may submit a written statement detailing the findings of fact, conclusions and procedural matters with which he disagrees, and his reasons for such disagreement. This written statement may cover any matters raised at any step in the hearing process, and legal counsel may assist in its preparation. The statement shall be submitted to the appellate review body through the chief executive officer at least ten (10) days prior to the scheduled date of the appellate review, except

if such time limit is waived by the appellate body. A written statement in reply may be submitted by the MEC or by the board, and if submitted, the chief executive officer shall provide a copy thereof the practitioner at least five (5) days prior to the schedules date of the appellate review.

6.3 PRESIDING OFFICER

The chairman of the joint conference committee shall be the presiding officer. He shall determine the order of procedure during the review, make all required rulings, and maintain decorum.

6.4 ORAL STATEMENT

The appellate review body, in its sole discretion, may allow the parties or their representatives to personally appear and make oral statements in favor of their positions. Any party or representative so appearing shall be required to answer questions put to him by any member of the appellate review body.

6.5 CONSIDERATION OF NEW OR ADDITIONAL MATTERS

New or additional matters or evidence not raised or presented during the original hearing or in the hearing report and not otherwise reflected in the record shall be introduced at the appellate review only in the discretion of the appellate review body, following an explanation by the part requesting the consideration of such matter or evidence as to why it was not presented earlier.

6.6 POWERS

The appellate review body shall have all the powers granted to the hearing committee, and such additional powers as are reasonably appropriate to the discharge of its responsibilities.

6.7 PRESENCE OF MEMBERS AND VOTE

A majority of the appellate review body must be present throughout the review and deliberations. If a member of the review body is absent from any part of the proceedings, he shall not be permitted to participate in the deliberations or the decision.

6.8 RECESSES AND ADJOURNMENT

The appellate review body may recess the review proceedings and reconvene the same without additional notice for the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation. Upon the conclusion of oral statements, if allowed, the appellate review shall be closed. The appellate review body shall thereupon, at a time convenient to itself, conduct its deliberations outside the presence of the parties. Upon the conclusions of those deliberations, the appellate review shall be declared finally adjourned.

6.9 RECORD OF THE PROCEEDINGS

A record of the proceedings of the appellate review body shall be taken and kept, which record may be in the form of detailed minutes or by electronic recording.

6.10 ACTION TAKEN

The appellate review body may recommend that the board affirm, modify, or reverse the adverse result or action taken by the MEC or by the board pursuant to Section 4.2 or 4.3-2(b), or, in its discretion, may refer the matter back to the hearing committee for further review and recommendations to be returned to it within a fixed period of time and in accordance with its instructions. Within ten (10) days after receipt of such recommendations after referral, the appellate review body shall make its recommendation to the board as provided in this Section 6.10.

6.11 CONCLUSION

The appellate review shall not be deemed to be concluded until all the procedural steps provided herein have been completed or waived.

ARTICLE VII—FINAL DECISION OF THE BOARD

7.1 BOARD ACTION

Within thirty (30) days after the conclusion of the appellate review, the board shall render its final decision in the matter in writing and shall send notice thereof to the practitioner by registered or certified mail, to the president of the medical staff and to the MEC. The decision of the board shall be immediately effective and final.

ARTICLE VIII—GENERAL PROVISIONS

8.1 ATTORNEYS

If the affected practitioner desires to be represented by an attorney at any hearing or at any appellate review appearance pursuant to Section 6.4, his initial request for the hearing must state his wish to be so represented at either or both such proceedings in the event they are held. The hearing committee and the appellate review body shall determine for the respective proceedings at which they shall preside, whether to permit such representation. If and only if the hearing committee or appellate review body allows the practitioner to be so represented shall the MEC or the board be allowed representation by an attorney. The foregoing shall not be deemed to deprive the practitioner, the MEC or the board of the right to legal counsel in connection with preparation for a hearing or an appellate review.

8.2 NUMBER OF HEARINGS AND REVIEWS

Notwithstanding any other provision of the medical staff by-laws or of this Plan, no practitioner shall be entitled as a right to more than one evidentiary hearing and one appellate review with respect to an adverse recommendation or action.

8.3 RELEASE

By requesting a hearing or appellate review under this Fair Hearing Plan, a practitioner agree to grant immunity with respect to civil prosecution for any testimony, evidence, or other material furnished by an individual either to the initial hearing committee or to the appellate review body. All persons who testify shall be immune from any civil liability for testimony given by them in any proceeding under this Fair Hearing Plan when such proceeding or hearing has been requested by the practitioner.

8.4 WAVIER

If at any time after receipt of special notice of an adverse recommendation, action, or result, a practitioner fails to make a required request or appearance or otherwise fails to comply with this Fair Hearing Plan or to proceed with the matter, he shall be deemed to have consented to such adverse recommendation, action, or result and to have voluntarily waived all rights to which he might otherwise have been entitled under the medical staff by-laws then in effect or under this Fair Hearing Plan with respect to the matter involved.

ARTICLE IX—ADOPTION AND AMENDMENT

9.1 ADOPTION

9.1-1 MEDICAL STAFF

The foregoing Fair Hearing Plan was adopted and recommended to the board by the medical staff of Deaconess Hospital, Inc. and shall be deemed to be an amendment to the constitution and by-laws of the medical staff and to form a part of the constitution and by-laws of the medical staff of Deaconess Hospital, Inc.

Date _____ _____

President of the Medical Staff

9.1-2 BOARD

The foregoing Fair Hearing Plan, as approved by the Medical Staff of Deaconess Hospital Inc., was adopted and approved by resolution of the Board of Directors of Deaconess Hospital, Inc., after considering the recommendation of the medical staff and its appropriate bodies and in accordance with and subject to the hospitals corporate by-laws.

Date _____ _____

Secretary of the Board

9.2 AMENDMENT

This Fair Hearing Plan may be amended or repealed in whole or in part in the same manner as amendments to the constitution and by-laws of the medical staff of the hospital.

*Adopted by the Medical Staff June 20, 1979

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No: 82 C 4296 Date: February 28, 1983

Title of Cause: Marrese v. Interqual, et al.

Brief Statement of Motion: Motion to Dismiss

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel: _____

_____

Representing: _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent: _____

_____

Reserve space below for notations by minute clerk

For the reasons stated in the Memorandum filed herewith, the court grants the defendants' motion to dismiss and this case is hereby dismissed in its entirety.—Draft

Leighton, *J.*

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

R. ANTHONY MARRESE, M.D., et al., *Plaintiffs,* *vs.* INTERQUAL, INC., et al., *Defendants.*	No. 82 C 4296 Before the Honorable George N. Leighton United States District Judge

Memorandum

Plaintiffs R. Anthony Marrese, M.D., and Bone & Joint Surgeons, Inc., bring this action under the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and 42 U.S.C. § 1983. Defendants are Interqual, Inc., Deaconess Hospital, the members of the Special Ad Hoc Committee of the Medical Staff at Deaconess (SAHC), the members of the Executive Committee of the Medical Staff at Deaconess and the members of the hospital's Board of Directors.

Plaintiffs' complaint is in six counts. In Counts I-IV they allege that the defendants' attempts to revoke Dr. Marrese's staff privileges at the Deaconess are part of a conspiracy which has restrained trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Count V alleges that the "Fair Hearing Plan" adopted by the hospital violates the Due Process Clause of the Fourteenth Amendment. Count VI raises a state law tort claim for tortious interference with a business relationship. Plaintiffs seek injunctive and compensatory relief.

The cause is before the court on the defendants' motion to dismiss or transfer brought pursuant to Rules 12(b)(2), 12(b)(3) and 12(b)(6), Fed. R. Civ. P., and 28 U.S.C. § 1404. Defendants assert that venue is improper in this district or alternatively, even if it were proper, the case should be

transferred to the Western District of Kentucky or the Southern District of Indiana. They further contend that plaintiffs have failed to allege facts sufficient to establish subject matter jurisdiction under the Sherman Act and have failed to state a claim for which relief can be granted under 42 U.S.C. § 1983. After careful consideration of the parties' submissions, the court concludes that it has no jurisdiction over the Sherman Act claims. It further concludes that plaintiffs have not stated a claim for which relief can be granted under 42 U.S.C. § 1983. Accordingly, it does not address the questions of venue or forum non conveniens.

The alleged facts, which are taken as true for the purposes of the motion, are as follows. Plaintiff Marrese is an employee of plaintiff Bone & Joint Surgeons, Inc., and has clinical privileges at the Deaconess Hospital. He is a Board certified orthopedic surgeon licensed to practice in Illinois and Indiana and specializes in disorders of the spine. In February 1978 an audit was conducted of "back" procedures performed at Deaconess. The results of the audit raised questions in the minds of the members of the SAHC, who conducted the audit, as to the appropriateness of the surgeries performed by Dr. Marrese. Following the audit, the SAHC recommended that certain of Dr. Marrese's cases be monitored. In August of 1980, defendant Interqual was retained to conduct a further audit of Dr. Marrese's cases. Based on the findings of the audit conducted by Interqual, the SAHC recommended to the Executive Committee that Dr. Marrese's clinical privileges be revoked. On April 28, 1982, the Executive Committee adopted the SAHC's recommendation but stayed any action upon it pending a further hearing as required by the hospital's Fair Hearing Plan. Shortly thereafter Dr. Marrese instituted this action.

I. The Sherman Act Claims

Defendants contend that the allegations of the amended complaint are insufficient to establish subject matter jurisdiction

under the Sherman Act. Section 1 of the Act prohibits contracts, combinations or conspiracies which restrain trade or commerce among the States. Section 2 bars attempts to monopolize any part of the trade or commerce between the States. Thus, these sections apply only to interstate transactions or activities. Interstate in this context refers to activities that are actually in interstate commerce as well as to activities that "while wholly local in nature, nevertheless substantially affect interstate commerce." *McClain v. Real Estate Board of New Orleans,* 444 U.S. 232, 241 (1980); *Hospital Building Co. v. Trustees v. Rex Hospital,* 425 U.S. 738, 743 (1976). Plaintiffs have not attempted to meet the "in commerce" test; jurisdiction in this case must then rest on the "affect on commerce test."

In order to meet this jurisdictional test, plaintiffs must allege facts, which if proved, would establish that the defendants' allegedly unlawful conduct would have a substantial effect on interstate commerce. *McClain,* 444 U.S. at 246; *Cardio-Medical Associate v. Crozer-Chester Medical Center,* 536 F.Supp. 1065, 1074 (E.D. Pa. 1982); *Pao v. Holy Redeemer Hospital,* 547 F.Supp. 484, 488-489 (E.D. Pa. 1982). With respect to interstate commerce, plaintiffs have alleged that Dr. Marrese treats people who travel in interstate commerce; that they purchase medicine and related supplies from out-of-state; that Dr. Marrese travels in interstate commerce as part of his business; and that they receive revenues from out-of-state sources such as insurance companies and Medicare.

Plaintiffs have not alleged what effect the defendants attempts to revoke Dr. Marrese's clinical privileges have had on the aspects of interstate commerce alleged. Other than generalized, conclusory allegations plaintiffs have failed to allege any substantial effect on interstate commerce. Viewing the allegations in the aggregate, the court must conclude, as the Tenth Circuit did in a similar case, *Wolf v. Jane Phillips Episcopal-Memorial Medical Center,* 513 F.2d 684, 687 (10th Cir. 1975), that "the facts alleged do not support the proposition that the

restraint upon plaintiff's practice causes more than an insubstantial effect upon interstate commerce." *See Cardio-Medical Association,* 536 F.Supp. at 1082-1083; *Grigg v. Blue Cross and Blue Shield of Michigan,* 1980-2 Trade Cases ¶ 63,500, 76,666 (E.D. Mich. 1980); *Barr v. National Right to Life Committee, Inc.,* No. 79-420-ORL-CIV-Y (M.D. Fla. July 27, 1981). Thus, because the court concludes that defendants' allegedly unlawful actions do not have a substantial effect on interstate commerce, Counts I-IV of the complaint must be dismissed for lack of subject matter jurisdiction.

II. **The Section 1983 Claims**

Section 42 U.S.C. 1983 in pertinent part, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In order to state a claim under Section 1983, the action complained of must be "state action"; the provisions of the section do not apply to purely private behavior. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981). The only involvement of the state alleged in this case is that the Fair Hearing Plan challenged by plaintiffs were adopted pursuant to an Indiana peer review statute. In this court's view, there is not a "sufficiently close nexus between the State and the challenged action of the unregulated entity that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 351 (1974). Accordingly, the court finds that plaintiffs have not alleged "state action" sufficient to state a claim under Section Sectioni 1983.

III. **State Law Claim**

Plaintiffs' remaining claim is based solely on state law. Under the doctrine of pendent jurisdiction, where the federal

claims have been dismissed before trial, a federal court should not retain jurisdiction over the state law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). Having dismissed the federal claims, and finding no circumstances which would justify the continued exercise of jurisdiction over this wholly state law claim, the court hereby dismisses the case in its entirety.

So ordered,

/s/ GEORGE N. LEIGHTON
George N. Leighton,
United States District Judge

Dated: February 28, 1983

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

R. ANTHONY MARRESE, M.D. and BONE & JOINT SURGEONS, INC., an Indiana corporation,

Plaintiffs,

vs.

INTERQUAL, INCORPORATED, a Delaware corporation,

and

DEACONESS HOSPITAL, an Indiana not-for-profit corporation,

and

WILLIAM H. ALLEN, M.D., BRYANT A. BLOSS, M.D., THOMAS EVANS, M.D., AHMET K. PERCINEL, M.D., PEDRO DOMINQUEZ, M.D., SAM B. BAKER, M.D., KENNETH NACHTNEBEL, M.D., DAVID A. JOHNSON and JOHN RENDER,

and

C. LE ROY ANDERSON, DAVID L. BARNING, C. JACKSON BUSCHKILL, MRS. JEAN G. DREMSTEDT, GERALD M. FINNEY, PHILLIP J. GEIER, MELVIN L. KALLENBACH, WILLIAM L. KECK, ROBERT L. KOCH, WILLIAM D. POWELL, DONALD A. RAUSCH, BERNARD E. SCHNACKE, DONALD E. STEEDLY, D. W. VAUGHN, and JAMES W. VOGEL,

Defendants.

Civil Action

No. 82 C 4296

JURY DEMANDED

Action under Sherman Anti-Trust Act and Clayton Anti-Trust Act (15 U.S.C. § 1 et seq. and 15 U.S.C., § 15 et seq.), and Pendent Jurisdiction Tortious Interference with Business Relations.

SECOND AMENDED COMPLAINT

JURISDICTION, VENUE, PARTIES

1. This Court has jurisdiction over the subject matter of Counts I through IV of this suit under 28 U.S.C. § 1337(a). This suit is brought under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to recover treble damages and Plaintiff's cost of suit, including reasonable attorney fees, and to obtain injunctive relief for defandant's continuing violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2).

2. Venue is properly laid in the Northern District of Illinois under 28 U.S.C. § 1391 in that Defendant, INTER-QUAL, has its principal place of business in this District, conducted its audit with employees and independent contractors doing business in this District, communicated in and from this District with a number of other Defendants and otherwise performed various acts which lead to the recommendation to terminate DR. MARRESE'S clinical privileges at the DEACONESS HOSPITAL (hereinafter reffered to as the "HOSPITAL").

3. Plaintiff, BONE & JOINT SURGEONS, INC., is an Indiana corporation with its main office in Evansville, Indiana.

4. Plaintiff, R. ANTHONY MARRESE, M.D. (hereinafter referred to as "DR. MARRESE") graduated first in his class from Loyola Stritch School of Medicine, and at the same time received a Masters of Science Degree in physiology from the Graduate School of Loyola University. He interned at The Johns Hopkins Hospital and did his residency in orthopedic surgery at the Northwestern University Group Hospitals. He is a Board certified orthopedic surgeon, residing in Evansville, Indiana, licensed to practice medicine in that state, as well as in the State of Illinois. He practices in all areas of orthopedic surgery and specializes in disorders of the spine as an employee of Plaintiff, BONE & JOINT SURGEONS, INC.

5. Approximately 300 patients per year travel from Western Kentucky and Southern Illinois into the State of Indiana for treatment by DR. MARRESE. Each patient is seen by DR. MARRESE on six separate occasions for a total of approximately 1,800 visits per year by out-of-state patients into the State of Indiana for the purpose of receiving medical treatment from DR. MARRESE. These patients are billed approximately $1,000,000.00 per year by DR. MARRESE andapproximately $10,000,000.00 by the HOSPITAL. As part of his regular telephonic and other communications accross the state lines with these patients and their out-of-state pharmacists, x-ray technicians and physical rehabilitation personnel. The vase majority of these patients are treated by DR. MARRESE at least once at the HOSPITAL and a large percentage of these cases involve complex spinal surgery. If DR. MARRESE'S privileges at the HOSPITAL are terminated, these patients will not cross state lines in the State of Indiana for their medical treatment for they come to DR. MARRESE because of his superior expertise in spinal diagnosis and treatment. The billing above referred to will, therefore, cease because DR. MARRESE'S practice is a hospital-based practice and he will be unable to continue the practice of medicine.

6. In the regular course of his treatment of both his interstate and intrastate patients, DR. MARRESE, through BONE & JOINT SURGEONS, INC., purchased medicine, equipment and related supplies from out-of-state purveyors. These purchases from out-of-state purveyors represented approximately $100,000.00 per year. If DR. MARRESE'S privileges at the HOSPITAL are terminated, DR. MARRESE'S medical practice will cease because it is primarily a hospital-based practice and these purchases will no longer be made.

7. In fact, at or about the time that Defendant, DEACONESS HOSPITAL, was taking the action hereinafter alleged, DR. MARRESE had entered into an agreement to

purchase a computerized tomography body scanner at a cost of approximately $500,000.00 from a firm located in the State of New Jersey, with financing to be obtained from a St. Louis, Missouri firm. Subsequent to that agreement being made a $7,844.50 down payment was made on this equipment. In the course of making arrangements for the purchase of this scanner DR. MARRESE entered into an agreement to have the scans of x-rays read by a national expert in the field of computerized tomagraphy scanning, a physician with offices in the State of North Carolina. As a result of the action hereinafter alleged, it was necessary for DR. MARRESE to cancel the agreement for the purchase of the scanner, cancel the arrangements for financing and cancel the arrangements for the reading of the x-rays by the out-of-state physician. The reading of the x-rays alone would have generated income to the reading physician of approximately $25,000.00 per year, which payments are not being made due to the action taken by the HOSPITAL as hereinafter alleged.

8. DR. MARRESE is a team physician for an Illinois high school and in this capacity has occasion to travel into the State of Illinois, treat injured athletes and, when necessary, bring these athletes back to the DEACONESS HOSPITAL for the purpose of providing medical treatment for them. If DR. MARRESE'S privileges at the HOSPITAL are terminated, these patients, too, will not cross state lines into the State of Indiana for medical treatment.

9. In the regular course of his interstate and intrastate medical practice DR. MARRESE, through Plaintiff, BONE & JOINT SURGEONS, INC., derives substantial revenue from the Federal health care program, commonly known as Medicare and Medicaid, as well as from private out-of-state insurance companies. In addition, BONE & JOINT SURGEONS, INC. pays management and accounting fees to various out-of-state consultants. The total amount of revenues from out-of-state private and public insurance carriers exceeds

$1,000,000.00 per year and fees paid to out-of-state accountants, management consultants, computer services and pension plan investments exceed $100,000.00. If DR MARRESE'S privileges at the DEACONESS HOSPITAL are, in fact terminated, these payments will likewise terminate.

10. DR. MARRESE admits more patients to the HOSPITAL surgical department than any other physician in the department and is the only physician at the HOSPITAL to present a scientific exhibit to the staff of the HOSPITAL and the only physician at the HOSPITAL to exhibit original work on the diagnosis and treatment of spinal disorders at the national conventions of the American Academy of Orthopaedic Surgeons, the North American Society of Radiologists and the American Society of Neurological Surgeons. In the last five years DR MARRESE has performed more complex spinal fusion operations than any other surgeon in the Evansville, Indiana marketing area and if DR. MARRESE'S privileges at the HOSPITAL are, in fact, terminated, both intrastate and interstate patients presently receiving medical care from DR. MARRESE will no longer have that care available to them in this marketing area.

11. Defendant, DEACONESS HOSPITAL, is a 650 bed not-for-profit health care facility incorporated in the State of Indiana, is the largest hospital in the Evansville, Indiana marketing area and is Evansville's third largest employer. Evansville is at the apex of the so-called "tri-state area" where the HOSPITAL regularly serves patients from Southern Indiana, Western Kentucky and Southern Illinois. Approximately 25% of the HOSPITAL'S patients travel from Kentucky and Illinois to the HOSPITAL for the purpose of receiving medical and surgical care from its professional staff.

12. The HOSPITAL'S regular billings with respect to said out-of-state patients exceed TWENTY-FIVE MILLION DOLLARS ($25,000,000.00) per year.

13. The HOSPITAL also purchsaes medical supplies and equipment in an amount not less than TWENTY MILLION DOLLARS ($20,000,000.00) per year from various out-of-state purveyors.

14. The conspiracy hereinafter alleged to terminate DR. MARRESE'S practice at the HOSPITAL and to drive him from any practice in the relevant market was a necessary and intended part of the larger conspiracy hereinafter alleged to suppress quality competition, and in particular the quality competition throughout that market as alleged in Paragraphs 34, 37 and 39 of this Second Amended Complaint.

15. At all times herein concerned, there existed at Defendant HOSPITAL, two committees which undertook dealings with Plaintiff, DR. MARRESE. For purposes of clarity, these committees are herein as follows:

(a) Special Ad Hoc Committee of the Medical Staff (hereinafter referred to as "SAHC"); and

(b) Executive Committee of the Medical Staff (hereinafter referred to as the "Executive Committee").

16. Defendant, WILLIAM H. ALLEN, M.D. (hereinafter referred to as "DR. ALLEN") is a resident of Evansville, Indiana, is a neurosurgeon on the staff of the HOSPITAL and, as such, is a competitor of Plaintiff, DR. MARRESE, for surgical spine patients in the Evansville, Indiana marketing area. Since February, 1978 he has been either a member or chairman of the SAHC.

17. Defendant, BRYANT A. BLOSS, M.D. (hereinafter referred to as "DR. BLOSS") is a resident of Evansville, Indiana, is an orthopedic surgeon on the staff of the HOSPITAL, and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients in the Evansville, Indiana marketing area. In addition, since May, 1980, he has been a member of the SAHC.

18. Defendant, THOMAS EVANS, M.D. (hereinafter referred to as "DR. EVANS") is a resident of Henderson, Kentucky, is an orthopedic surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients from the Evansville, Indiana marketing area. In addition, since August, 1978 he has been a member of the SAHC.

19. Defendant, AHMET K. PERCINEL, M.D. (hereinafter referred to as "DR. PERCINEL") is a resident of Evansville, Indiana, is an orthopedic surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine and other patients from the Evansville, Indiana marketing area. In addition, since August 1978 he has been a member of the SAHC.

20. Defendant, PEDRO DOMINQUEZ, M.D. (hereinafter referred to as "DR. DOMINQUEZ") is a resident of Evansville, Indiana, is a neurological surgeon on the staff of the HOSPITAL and as such is a competitor of Plaintiff, DR. MARRESE, for surgical spine patients from the Evansville, Indiana marketing area. In addition, since May, 1980, he has been a member of the SAHC.

21. Defendant, SAM B. BAKER, M.D. (hereinafter referred to as "DR. BAKER") is a resident of Evansville, Indiana, a Director of the HOSPITAL, where he was until recently Chief of Radiology and President of the Medical Staff. In addition, at all times herein alleged, he has been a member of the SAHC and the Executive Committee. Furthermore, DR. BAKER attended SAHC meetings of February, 1982 and March 22, 1982 and is a competitor of Plaintiff, DR. MARRESE, for the delivery of radiological services in the Evansville, Indiana marketing area.

22. Defendant, DAVID A. JOHNSON, (hereinafter referred to as "JOHNSON") is Administrator of the HOSPITAL and a member of SAHC and the Executive Committee and attended the meetings of those committees in 1982.

23. Defendant, JOHN C. RENDER (hereinafter referred to as "RENDER") is a resident of Indianapolis, Indiana, and is

the attorney for and a member of SAHC and the Executive Committee. In performing the acts hereinafter alleged he acted beyond his role as attorney for the committee and as an independent conspirator to not only deny DR. MARRESE'S privileges at the HOSPITAL, but, also, to impair DR. MARRESE'S ability to conduct medical research. This conduct consisted of retaining Defendant, INTERQUAL, to perform a false and malicious audit of some of DR. MARRESE'S back surgery and by funnelling to INTERQUAL hospital records and information which were either false and/or inadequate in order for Defendant, INTERQUAL, to make a judgment as to the appropriateness of DR. MARRESE'S surgical procedures.

24. In addition, he falsely testified before an Indiana legislative committee concerning the use of a certain drug which DR. MARRESE had proposed to use for research purposes at the HOSPITAL. As a result of this testimony, the use of this drug by DR. MARRESE or any Indiana physician was not permitted, thereby denying DR. MARRESE an opportunity to further enhance his reputation in the medical community and amongst patients in the Evansville, Indiana marketing area.

25. Defendant, KENNETH NACHTNEBEL, M.D. (hereinafter referred to as "DR. NACHTNEBEL") is a resident of Evansville, Indiana and as of May 1, 1982 was President of the Medical Staff, a Director of the HOSPITAL and a member of the Executive Committee.

26. Defendants, C. LEROY ANDERSON, DAVIL L. BARNING, C. JACK BUSCHKILL, MRS. JEAN G. DREMSTEDT, GERALD M. FINNEY, PHILIP J. GEIER, ROBERT L. KOCH, WILLIAM D. POWELL, DONALD A. RAUSCH, BERNARD E. SCHNACKE, D.W. VAUGHN and JAMES W. VOGEL, are all residents of Evansville, Indiana and are members of the Board of Directors of Defendant, HOSPITAL.

27. Defendants, MELVIN L. KALLENBACH and DONALD E. STEEDLY, are residents of Newburg, Indiana and

Defendant, WILLIAM L. KECK, is a resident of Mt. Vernon, Indiana and are also members of the Board of Directors of the HOSPITAL.

28. All of the Directors named herein have directly assisted and promoted the alleged conspiracy of the other Defendants by declining to take reasonable precautions to prevent the anti-competitive practices hereinafter enumerated.

29. As a result of Defendants' continuing conspiracy and other action in violation of the federal antitrust, as hereinafter fully described, interstate commerce relative to the providing of orthopedic, neurological spine surgical services at the HOSPITAL and in the HOSPITAL'S marketing area has been and will continue to be substantially adversely affected in that, among other things, Defendants would perpetuate and reinforce a variety of restrictive, anti-competitive practices in the relevant market. DR. MARRESE is and has been the major opponent of such practices and Defendants now seek to exclude him from the relevant market for that reason and because of the serious competition threat that he poses to them.

RELEVANT MARKET

30. The relevant market for purposes of the antitrust counts of this Complaint is the market for orthopedic and neurological spinal surgical procedures performed in Evansville, Indiana.

COUNT I

1.-30. The allegations of paragraphs 1 through 30 are hereby incorporated by reference.

31. Beginning in early 1978 and continuing thereafter to the present, the Defendants have engaged in an unlawful conspiracy to exclude DR. MARRESE from the Evansville,

Indiana marketing area by falsely charging that he is unqualified to practice and compete therein.

32. Said conspiracy has consisted of, among other things, a continuing course of action among the individual medical defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, and the Defendant HOSPITAL, and its Administrator, Defendant JOHNSON and Defendants RENDER and INTERQUAL in falsely accusing DR. MARRESE of performing large numbers of inappropriate and unwarranted surgical procedures when, in fact, his success is due to the screening of both interstate and intrastate patients and the knowledge and expertise DR. MARRESE has in the area of spinal diagnosis and treatment.

33. Said conspiracy was undertaken not only because of DR. MARRESE'S aforesaid success in attracting a number of patients that greatly exceeded the number attracted to any other orthopedic surgeons on the HOSPITAL'S staff, but, also, because DR. MARRESE refused to abide by a number of long-entrenched, anti-competitive trade practices within the aforesaid market.

34. One such practice is an apprenticeship system imposed upon all orthopedic surgeons first entering the Evansville, Indiana marketing area, but especially upon those who enter from outside the State of Indiana. In order to become a member of the Medical Staff at the HOSPITAL, this system dictates than an orthopedic surgeon first become "apprenticed" to an orthopedic surgeon on the staff of the HOSPITAL and thereafter remain in his employ for an extended but undefined period of time without becoming a professional challenge to the employer.

35. DR. MARRESE was formerly thus "apprenticed" to Defendant BLOSS, but was discharged as soon as he showed signs of a willingness to compete with him.

36. Upon leaving the employ of DR. BLOSS, DR. MARRESE refused to withdraw as a staff member at the HOSPITAL and refused to become employed by or associated with another member of the medical staff of the Hospital. Instead, he went directly into competition with them, thus further offending the anti-competitive local tradition.

37. Another such anti-competitive trade practice is the refusal of orthopedic and neurological surgeons to accept patients who have been treated by other orthopedic surgeons in the market area, without specific approval and referral from those surgeons.

38. DR. MARRESE has also refused to conform to this trade practice and has, in fact, attracted considerable patient business from his competitors at the Hospital in particular and in the relevant market in general.

39. Another such anti-competitive practice is the opposition of staff orthopedic and neurological surgeons and the HOSPITAL to the introduction of advanced, highly sophisticated diagnostic equipment by any orthopedic surgeon in his office for his own use.

40. DR. MARRESE'S active competition also offended this practice when he made an initial deposit of $7,844.50 for the purchase of a $500,000.00 advanced computerized Tomography Body Scanner (known as "C. T. Scanner") from an out-of-state firm for his exclusive office use, which was perceived by Defendants to be a serious threat to their own trade practice. This purchase has not been completed as of the date of this Second Amended Compiaint due to the threatened termination of DR. MARRESE'S staff privileges.

41. The private acquisition of such an advanced diagnostic tool in conjunction with the continuation of his staff privileges would automatically have placed DR. MARRESE at an even greater competitive advantage over the other members of the

orthopedic, neurological and radiological staff of the HOSPITAL, as well as causing substantial loss of revenue to the HOSPITAL.

42. Another such anti-competitive trade practice has been the refusal of all orthopedic surgeons on the HOSPITAL'S staff to treat a patient of DR. MARRESE'S when DR. MARRESE was out of town even when the patient was in critical need of orthopedic services.

43. On information and belief, DR. MARRESE states that he has been attached for doing "to many backs" and because his patients occupy a relatively large number of beds at the HOSPITAL, thus making it more difficult for Defendants' orthopedic and neurological surgeons to hospitalize their patients. He has also been attacked because of his diagnostic and surgical ability to correct a variety of complex spinal conditions that local competitor surgeons are unable to perform. Still another reason for the attack on DR. MARRESE is that he is in direct competition with local neurological surgeons for the performance of certain spinal procedures.

44. In formulating and effectuating their resulting conspiracy to eliminate plaintiffs as competitors in the relevant market and particularly for patients treated at the HOSPITAL, Defendants further specifically agreed and conspired to perform the following acts:

(a) In February, 1978, Defendant, ALLEN, a member of the Medical Staff of the HOSPITAL, recommended that an audit be conducted of "back" procedures performed at the HOSPITAL. It had previously been the practice at the HOSPITAL to have audits of this general sort performed by the Medical Audit Committee, and the Executive Committee initially recommended that this audit be conducted by that Committee, of which DR. MARRESE was a member. However, subsequently, the audit was instead assigned to SAHC, a Committee headed by a

urologist, Dr. Rabin. Dr. Rabin immediately named Defendants, ALLEN, EVANS and PERCINEL to that Committee.

(b) Althought Plaintiffs are not now aware of the exact numbers involved, there were approximately three times as many lumbar laminectomies as spinal fusions performed at the HOSPITAL during the period in question. Nevertheless, the members of SAHC, knowing full well that DR. MARRESE performed the vast majority of spinal fusions, audited 50 lumbar laminectomies and 40 spinal fusions. Of the 40 spinal fusions audited, 32 were performed by DR. MARRESE and eight by six other orthopedic surgeons.

(c) All of DR. MARRESE'S lumbar laminectomies were found to have been performed in accordance with the nationwide and areawide quality criteria. Notwithstanding that DR. MARRESE'S spinal fusions also met all nationwide and areawide quality criteria, SAHC, then consisting of defendants, ALLEN, BLOSS, EVANS and PERCINEL, elected to examine those audited cases by the arbitrary and restrictive criteria of what they considered to be "reasonable" grounds for performing such surgery. Thus, in 24 of DR. MARRESE'S 32 spinal fusions audited, the Committee questioned the appropriateness, but not the results of DR. MARRESE'S surgery.

(d) There was no objective basis for such findings; indeed in various of the cases that were audited, DR. MARRESE undertook the surgery because of continuing severe spinal problems experienced by patients, some of whom had been under the care of other competing orthopedic and neurological surgeons, but had not had those problems corrected.

(e) During the course of the aforesaid audit, defendants concealed its existence from DR. MARRESE. Subse-

quently, upon its conclusion and without affording him an opportunity to respond, defendant, ALLEN, the then Acting Chairman of the SAHC, officially recommended to the full medical staff that all of DR. MARRESE'S lumbar laminectomies and spinal fusion cases should be monitored, and all his cases which did not have a positive radiological finding should be subjected to a mandatory second opinion.

(f) In making this recommendation to the full medical staff, defendant, ALLEN, violated the provisions of the Indiana Peer Review Statute which provides that any health care provider under investigation be allowed to review all the date collected by the relevant committee and to offer rebuttal data before any outside disclosure or making of recommendations by the Committee.

(g) Following the aforesaid publication and negative recommendations by the SAHC, DR. MARRESE met with defendants, PERCINEL, ALLEN and EVANS on or about January 31, 1980, to discuss 24 of the 32 cases audited which had been criticized. At that meeting, only one case was reviewed and the records in that case themselves disclosed that it met all areawide and nationwide criteria.

(h) This discovery so angered the SAHC that defendant, ALLEN, appointed new members to that Committee including defendants, BLOSS and DOMINQUEZ. The SAHC then sent 8 of the 32 cases to an outside auditor for review. After reviewing these cases, the outside auditor stated that he could form no conclusion about DR. MARRESE but, instead, recommended that not only DR. MARRESE'S but all other orthopedic and neurological procedures performed at the HOSPITAL be sent for an outside audit for review by two auditors, one to be selected by DR. MARRESE and one to be selected by the HOSPITAL.

(i) However, because of its desire to single out DR. MARRESE for punishment for his departures from the aforesaid anti-competitive practices, the HOSPITAL failed to act upon this recommendation.

45. Thereafter, in August, 1980, a proposal was made to require each staff member at the HOSPITAL to provide two alternate physicians in that member's sub-specialty, to attend a doctor's patients in the event of that doctor's absence. In immediate succession, at the end of the same month, every member of the orthopedic staff either resigned or refused DR. MARRESE'S request to serve as his alternate.

46. At approximately the same time that it became general knowledge that Plaintiffs intended to purchase a scanner, the HOSPITAL, at the instigation of, and in conspiratorial combination with the individual members of the medical staff, instructed a member of the SAHC and the Medical Staff Executive Committee, JOHN RENDER, a defendant herein, to contact defendant, INTERQUAL, a company engaged in the business of performing medical audits, with the express purpose of conducting a second audit on certain of plaintiff MARRESE'S lumbar laminectomies and spinal fusions, not previously subjected to audit.

47. Defendant, INTERQUAL, conducted an audit of 93 of DR. MARRESE'S procedures, 70 of which were lumbar procedures and 23 of which were cervical procedures.

48. In conducting this audit, defendant, INTERQUAL, reviewed only the facesheets, the history and physical examination, a limited number of x-ray reports, laboratory test results and discharge summaries. When the record reflected the existence of other materials bearing upon the conclusions that had been drawn, defendant, INTERQUAL, did not request this material. When abnormalities were noted in the body of an x-ray report, INTERQUAL disregarded that information. When additional x-rays and diagnostic tests were performed

outside of the hospital and this was reflected in the material in their possession, defendant, INTERQUAL, did not request an opportunity to review that information. Defendant, INTERQUAL, made no attempt to read myleograms, misread myleogram reports, failed to secure other reports, suggested "Fourth Generation C. T. scans" when such procedures were not technically available during the time period in question, and submitted a report that contained so many clerical and interpretative errors that it relects a total lack of good faith and malice towards Plaintiffs.

49. Defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, RENDER, and JOHNSON, as members of the SAHC, have now made the finding of INTERQUAL the basis for their recommendation to the Executive Committee of the medical staff to revoke the clinical privileges of DR. MARRESE at the HOSPITAL. This unquestioned adoption of the INTERQUAL report by the Executive Committee in conjunction with the other conduct enumerated herein exhibits a complete lack of good faith on the part of the Committee members and malice towards the Plaintiffs.

50. On April 28, 1982, the Executive Committee adopted the recommendation of the SAHC but stayed the termination of DR. MARRESE'S clinical privileges pending the hearing called for in the HOSPITAL'S "Fair Hearing Plan."

51. The attempt to exclude DR. MARRESE from staff privileges at the HOSPITAL and from providing medical services to his patients in the Evansville, Indiana marketing area, has been motived by his competitors' malice directed toward his aggressive competitive actions, his treatment of former patients of other staff members without prior referral from them, his development of a successful independent medical practice, his refusal to remain employed by or associated with other area orthopedic surgeons, his refusal to resign his staff privileges, and his refusal to abide by various other anticompetitive trade practices at the HOSPITAL.

52. On information and belief, some of those same competitors the defendant doctors, have likewise conspired to exclude DR. MARRESE from the American Academy of Orthopedic Surgeons, thus further injuring him and impairing his practice.

DAMAGES

53. As a direct and proximate result of defendants' conspiracy, DR. MARRESE has suffered a severe professional stigma accompanied by a loss in patient referrals from other physicians and the nursing staff at the HOSPITAL. This total loss of profits from these sources alone over the past four years has been not less that $1,500,000.

54. If Defendants' conspiracy is successful in its ultimate objective of driving DR. MARRESE from the Evansville, Indiana marketing area, he will lose the entire accumulated goodwill of his present practice, his recognition as an able orthopedic surgeon and in his subspecialty of spinal surgery, and be unable to practice orthopedic medicine anywhere else in the United States because of the cost of medical malpractice insurance, and because no other hospital could afford the risk of accepting DR. MARRESE on its staff. The damage to DR. MARRESE, therefore, will represent not less than $15,000,000.00 over the estimated remainder of his professional career.

WHEREFORE, Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter a judgment against all of the Defendants and each of them, for three times the total of the above amounts together with all costs of this action, including reasonable attorney's fees.

COUNT II

1.-53. The allegations of Paragraphs 1 through 53 are hereby incorporated by reference.

54. The exact amount of DR. MARRESE'S future damages in the event that the aforesaid conspiracy is fully successful cannot presently be determined. However, his injury will be grave and irreparable. No money damages can ever fully compensate him for this threatened, lifelong professional disgrace.

WHEREFORE, pursuant to § 16 of the Clayton Act (12 U.S.C. § 26) Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter a permanent injunction restraining defendants and each of them from all of the aforesaid continuing anti-trust violations, and that it grant them such other and further relief as it may deem just and proper, together with all costs of this action, including reasonable attorney's fees.

COUNT III

1.-53. The allegations of Paragraphs 1 through 53 of Count II are hereby incorporated by reference.

54. Defendants' acts and conspiracy as above described have constituted an attempt and conspiracy to monopolize the aforesaid market for the delivery of orthopedic and neurological spinal surgical procedures. They have done so by taking, threatening to take, condoning and assisting the taking of exclusionary action against all competitors who are seen as competitively "aggressive".

55. More than 40% of all the orthopedic and neurological surgical operations performed in Evansville during each of the

past four years were performed at the HOSPITAL by members of its professional staff.

56. The HOSPITAL possesses unique and indispensable facilities for the sorts of complex, specialized operations that comprise the relevant service market as above defined. It is, therefore, a distinct submarket within that market and an "essential" facility to which every competitor must have fair and equal access in order to compete effectively.

57. Moreover, immediately upon the termination of his clinical privileges at defendant HOSPITAL, all other hospitals in the Evansville, Indiana marketing area at which DR. MARRESE is presently affiliated, will also be required to terminate his staff privileges since their malpractice carriers will provide no coverage for DR. MARRESE'S procedures.

58. The intent and natural effect of the aforesaid anticompetitive practices directed against any competitor who, like DR. MARRESE, is seen as "aggressive" in seeking to take professional business from any other competitors is to reduce the overall level of output of the relevant services in the relevant market.

WHEREFORE, pursuant to § 4 of the Clayton Act (15 U.S.C. § 15) Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray for the same relief sought with respect to Count I.

COUNT IV

1.-54. Plaintiff hereby realleges Paragraphs 1 through 54 of Count II as Paragraphs 1 through 54 of this Count IV.

WHEREFORE, pursuant to § 16 of the Clayton Act (15 U.S.C. § 26) Plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter a Permanent Injunction and restraining defendants and each of them from all of the aforesaid continuing antitrust violations, and that it

grant them such other and further relief as it may deem just and proper, together with all costs of this action including reasonable attorney's fees.

COUNT V

PENDENT JURISDICTION—TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

1.-52. The allegations of Paragraphs 1 through 52 of Count II are hereby incorporated by reference.

53. Beginning at the time of their involvement as hereinbefore alleged, defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, JOHNSON, RENDER, INTERQUAL, INC. and the HOSPITAL, with full knowledge that plaintiff MARRESE'S staff privileges at defendant HOSPITAL constituted the foundation for both plaintiffs success in the business of delivering orthopedic, neurological and radiological medical services, did wrongfully and maliciously endeavor to cause plaintiff MARRESE'S staff privileges at the HOSPITAL to be terminated and did by their acts, as above enumerated, attempt to force plaintiff MARRESE to leave the town of Evansville, Indiana.

54. That all of the acts alleged above were performed by these defendants with the sole design of injuring plaintiffs and destroying their business and not for the purpose of serving any legitimate interest.

55. As a direct and proximate result of defendants' conduct, DR. MARRESE has suffered a severe professional stigma accompanied by a loss in patient referrals from other physicians as well as the nursing staff of the HOSPITAL. This total loss of profit from these sources alone over the past four years has been no less than $1,500,000.00.

56. If defendants' efforts are successful in their ultimate objective of causing plaintiff MARRESE'S staff privileges at the

HOSPITAL to be terminated and in forcing DR. MARRESE to leave the Evansville, Indiana marketing area, he will lose the entire accumulated goodwill of his present practice, his recognition as a competent orthopedic surgeon in all areas of that practice, and particularly in his sub-specialty of spinal surgery, and be unable to practice orthopedic medicine anywhere in the United States because of the cost of medical malpractice insurance and because no other hospital could afford the risk of accepting DR. MARRESE on its staff. The damage to DR. MARRESE, therefore, would represent no less that $15,000,000.00 over the estimated remainder of his professional career.

WHEREFORE, plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter judgment against defendants, ALLEN, BLOSS, EVANS, PERCINEL, DOMINQUEZ, BAKER, NACHTNEBEL, JOHNSON, RENDER, INTERQUAL, INC. and HOSPITAL and each of them for $16,500,000.00 together with costs of this action.

COUNT VI

1.-56. The allegations of Paragraphs 1 through 56 of Count V are hereby incorporated by reference.

57. The exact amount of plaintiffs' future damages in the event that the acts enumerated above performed by defendants are fully successful, cannot presently be determined. However, his injury will be grave and irreparable. No money damages can ever fully compensate him for this threatened termination of his clinical privileges and his lifelong professional disgrace.

WHEREFORE, plaintiffs, DR. MARRESE and BONE & JOINT SURGEONS, INC., pray that this Court enter a Permanent Injunction restraining said defendants and each of them from all of the aforesaid acts and that is grant them such

other and further relief as it may deem just and proper, together with all costs of this action.

R. ANTHONY MARRESE, M.D. and
BONE & JOINT SURGEONS, INC.

By: /s/ JOHN CASEY
John J. Casey,
One of Their Attorneys

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JURY DEMAND

I, John J. Casey, one of the attorneys for plaintiffs, R. ANTHONY MARRESE, M.D. and BONE & JOINT SURGEONS, INC., hereby demand a trial by jury on the issues listed in this Complaint.

/s/ JOHN J. CASEY
John J. Casey

JOHN J. CASEY
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Suite 1025
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(312) 346-6650

CERTIFICATE OF DELIVERY

I hereby certify that I have delivered a true and correct copy of the foregoing instrument to the following attorneys of record, in sealed envelopes, addressed as follows:

DENNIS J. HORAN, ESQ.
GEORGE W. SPELLMIRE, ESQ.
HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
69 W. Washington Street
Chicago, IL 60602

NANCY SCHAEFER, ESQ.
KARON, MORRISON & SAVIKAS
5720 Sears Tower
233 South Wacker Drive
Chicago, IL 60606

RICHARD FRENCH, ESQ.
FRENCH, ROGERS, KEZELIS &
KOMINIAREK, P.C.
33 North Dearborn Street
Chicago, IL 60602

DATED: Chicago, Illinois, this 3rd day of March, 1983.

/s/ JOHN J. CASEY
John J. Casey

JOHN J. CASEY
LANDESMAN & SCHWARTZ
111 W. Washington Street
Suite 1025
Chicago, IL 60602
(312) 346-6650

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

Name of Presiding Judge, Honorable George N. Leighton

Cause No: 82 C 4296 Date: March 18, 1983

Title of Cause: Marrese v. Interqual, et al.

Brief Statement of Motion: Motion for Leave to File Second Amended Complaint, Motion to Reconsider

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel:

Representing:

Names and Addresses of other counsel entitled to notice and names of parties they represent:

Reserve space below for notations by minute clerk

For the reasons stated in the Memorandum filed herewith, the motion for leave to file a second amended complaint is denied and the court adheres to its ruling of February 28, 1983 dismissing the first amended complaint.

Leighton, *J.* Docketed March 21, 1983

U.S.C.A.—7th Circuit
Received
June 31, 1983
Thomas F. Strubbe
Clerk

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 83-1581

R. ANTHONY MARRESE, M.D., and BONE & JOINT SURGEONS, INC., *Plaintiffs-Appellants,* *vs.* INTERQUAL, INC., et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Eastern District of Illinois No. 82 C 4296 Honorable George N. Leighton

NOTICE OF MOTION

To: NANCY SCHAFFER
KARON, MORRISON & SAVIKAS, LTD.
5720 Sears Tower
233 S. Wacker Drive
Chicago, IL 60606

D. KENDALL GRIFFITH
HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER
69 W. Washington Street
Chicago, IL 60602

RICHARD FRENCH
FRENCH, ROGERS, KEZELIS & KOMINIAREK, P.C.
33 N. Dearborn Street
Chicago, IL 60602

PLEASE TAKE NOTICE that on the 21st day of June, 1983, we caused to be filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, the attached motion, pursuant to Rule 10(e), Federal Rules of Appellate Procedure, to amend the record on appeal and to file a Third Amended Complaint.

/s/ JOHN J. CASEY
John J. Casey

JOHN J. CASEY
LANDESMAN & SCHWARTZ
Attorneys for Plaintiffs-Appellants
111 W. Washington Street
Suite 1025
Chicago, IL 60602
(312) 346-6650

U.S.C.A.—7th Circuit
Received
June 21, 1983
Thomas F. Strubbe
Clerk

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 83-1581

R. ANTHONY MARRESE, M.D., and BONE & JOINT SURGEONS, INC., *Plaintiffs-Appellants,* *vs.* INTERQUAL, INC., *et al.,* *Defendants-Appellees.*	Appeal from the United States District Court for the Eastern District of Illinois No. 82 C 4296 Honorable George N. Leighton

MOTION

R. Anthony Marrese, M.D., and Bone & Joint Surgeons, Inc., by their attorney, John J. Casey, of the firm of Landesman & Schwartz, pursuant to Rule 10(e), Federal Rules of Appellate Procedure, move this honorable Court to permit plaintiffs to amend the record on appeal to include plaintiffs' Second Amended Complaint and plaintiffs' Motion to file a third amended complaint and in support thereof state as follows:

One: On March 18, 1983, an order was entered by the district judge denying plaintiffs' motion to file a second amended complaint and adhering to the Court's ruling of February 28, 1983, dismissing the First Amended Complaint. That Order and Memorandum appear in the record as R.79. The Memorandum, page 2, refers to the Second Amended Complaint.

Two: For the purpose of this filing, the Second Amended Complaint has been marked R.84.

Three: On March 25, 1983, plaintiff filed a motion, which, amongst other things, advised the Court of certain matters that they wished to insert in a third amended complaint. On March 25, 1983, that motion was denied in so far as leave was sought to file a third amended complaint. The Minute Order bearing that date is presently in the record as R.81.

Four: For the purpose of this motion and the record the motion of March 25, 1983, has been assigned No. R.85.

Five: The inclusion of these items in the record is necessary so that this Court will have a full picture of the facts before it and before the District Court.

WHEREFORE, R. Anthony Marrese and Bone & Joint Surgeons, Inc., move this honorable Court for leave to amend the record on appeal to include plaintiffs' Second Amended Complaint and plaintiffs' motion to file a third amended complaint.

Respectfully submitted,

R. ANTHONY MARRESE, M.D., and
BONE & JOINT SURGEONS, INC.,

By: /s/ JOHN J. CASEY
John J. Casey,
One of Their Attorneys

JOHN J. CASEY
LANDESMAN & SCHWARTZ
Attorneys for Plaintiffs-Appellants
111 W. Washington Street
Suite 1025
Chicago, IL 60602
(312) 346-6650

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

JOHN J. CASEY, being first duly sworn on oath, deposes and says that he served the foregoing instrument upon:

NANCY SCHAFFER
KARON, MORRISON & SAVIKAS, LTD.
5720 Sears Tower
233 S. Wacker Drive
Chicago, IL 60606

D. KENDALL GRIFFITH
HINSHAW, CULBERTSON, MOELMANN,
HOBAN & FULLER
69 W. Washington Street
Chicago, IL 60602

RICHARD FRENCH
FRENCH, ROGERS, KEZELIS &
KOMINIAREK, P.C.
33 N. Dearborn Street
Chicago, IL 60602

by mailing true and correct copies of the same this 21st day of June, 1983, and by depositing the said copies in the United States Mail at 111 W. Washington Street, Chicago, Illinois, 60602, postage prepaid, addressed as above shown.

/s/ JOHN J. CASEY

SUBSCRIBED and SWORN to before me this 21st day of June, 1983.

K. L. JAQUET
Notary Public

JOHN J. CASEY
Landesman & Schwartz
111 West Washington Street
Suite 1025
Chicago, Illinois 60602
(312) 346-6650

The Indiana Immunity—Privileged Communication Professionals and Peer Review Committees Ind Code §§ 34-4-12.6-1(b)-(f); 34-4-12.6-2(a)-(d), 34-4-12.6-3(a)-(d), 34-4-12.6-4

Ind. Code 34-4-12.6-1. Definitions.

(b) As used in this chapter, "evaluation of patient care" relates to:

(1) The accuracy of diagnosis;

(2) The propriety, appropriateness, or necessity of care rendered by a professional health care provider; and

(3) The reasonableness of the utilization of services, procedures and facilities in the treatment of individual patients.

As used in this chapter, the term does not relate to charges for services nor to methods used in arriving at diagnoses.

(c) As used in this chapter, "peer review committee" means a committee having the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint. The committee must meet the following criteria:

(1) The committee is organized:

(A) By a state, regional, or local organization of professional health care providers or by a not-for-profit foundation created by such a professional organization for purposes of improvement of patient care;

(B) By the professional staff of a hospital or other health care facility;

(C) By state or federal law or regulation; or

(D) As a governing board of a hospital or professional health care organization.

(2) A majority of the members of the committee are professional health care providers holding licenses in the stated profession of the committee, or the governing board of a hospital or professional health care organization. However, "peer review committee" does not include a medical review panel created under IC 16-9.5-9.1.

(d) As used in this chapter, "professional staff" means all professional health care providers holding licenses in a single profession, authorized to provide health care in a hospital or other health care facility.

(e) As used in this chapter, "personnel of a peer review committee" means not only members of the committee but also all of the committee's employees, representatives, agents, attorneys, investigators, assistants, clerks, staff, and any other person or organization who serves a peer review committee in any capacity.

(f) As used in this chapter, "in good faith" refers to an act taken without malice after a reasonable effort to obtain the facts of the matter and in the reasonable belief that the action taken is warranted by the facts known. In all actions to which this chapter applies, good faith shall be presumed; and malice shall be required to be proven by the person aggrieved.

(g) As used in this chapter, "professional health care organization" means an organization composed of professional health care providers.

Ind. Code 34-4-12.6-2. Confidentiality and privilege.—(a) All proceedings of a peer review committee shall be confidential, and all communications to a peer review committee shall be privileged communications to the peer review com-

mittee. Neither the personnel of a peer review committee nor any participant in a proceeding therein shall reveal any content of communications to, or the records or determination of, a peer review committee outside the peer committee. However, the governing board of a hospital or professional health care organization may disclose the final action taken with regard to a professional health care provider without violating the provisions of this section. Except as otherwise provided in this chapter, no person who was in attendance at any such peer review committee proceeding shall be permitted or required to disclose any information acquired in connection with or in the course of such proceeding, or to disclose any opinion, recommendation, or evaluation of the committee or of any member thereof. Information otherwise discoverable or admissible from original sources is not to be construed as immune from discovery or use in any proceeding merely because it was presented during proceedings before such peer review committee, nor is a member, employee, or agent of such committee or other person appearing before it to be prevented from testifying as to matters within his knowledge and in accordance with the other provisions of this chapter, but the witness cannot be questioned about this testimony or other proceedings before such committee or about opinions formed by him as a result of committee hearings.

(b) Any professional health care provider under investigation shall be permitted at any time to see any records accumulated by a peer review committee pertaining to his personal practice and shall be offered the opportunity to appear before the peer review committee with adequate representation to hear all charges and findings concerning his practice and to offer rebuttal information, which shall be a part of the record before any disclosure of the charges and findings under this chapter. However, a professional health care provider under investigation in a hospital is entitled to only one [1] evidentiary hearing before a peer review committee of the medical staff and one [1] additional hearing on appeal before the governing

board of the hospital. Communications to, and the records and determinations of, a peer review committee may only be disclosed to the peer review committee of a hospital or other health facility, the disciplinary authority of the professional organization of which the professional health care provider under question is a member, or the appropriate state board of registration and licensure which the committee considers necessary for recommended disciplinary action, and shall otherwise be kept confidential for use only within the scope of the committee's work.

(c) Except in cases of required disclosure as authorized in this chapter, no records or determinations of, or communications to, a peer review committee shall be:

(1) Subject to subpoena or discovery; or

(2) Admissible in evidence;

in any judicial or administrative proceeding, including a proceeding under IC 16-9.5-10, without a prior waiver executed by the committee. Except in cases as authorized in this chapter, the evidentiary privileges created by this section shall be invoked by all witnesses and organizations in all judicial and administrative proceedings unless the witness or organization first has a waiver of the privilege executed in writing, on behalf of the peer review committee holding the privilege, by its chairman, vice chairman, or secretary.

(d) The immunities granted by section 3[34-4-12.6-3] of this chapter shall not extend to any person who violates the confidentiality requirements of this section.

Ind. Code 34-4-12.6-3. Immunity.—(a) There shall be no liability on the part of, and no action of any nature shall arise against, the personnel of a peer review committee for any act, statement made in the confines of the committee, or proceeding thereof made in good faith in regard to evaluation of patient care as that term is defined and limited in section 1(b) [34-4-12.6-1(b)] of this chapter.

(b) Persons or organizations, including peer review committees, who, in good faith, furnish records, information or assistance to a peer review committee, in regard to evaluation of qualifications of professional health care providers, or of patient care as that term is defined and limited in section 1(b) of this chapter, shall be immune from any civil action arising from such acts.

(c) The personnel of a peer review committee shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care as that term is defined and limited in section 1(b) of this chapter.

(d) No restraining order or injunction shall be issued against a peer review committee or any of the personnel thereof to interfere with the proper functions of the committee acting in good faith in regard to evaluation of patient care as that term is defined and limited in section 1(b) of this chapter.

Ind. Code 34-4-12.6-4. Use of information obtained by peer review committees.—A professional health care provider, a peer review committee, and the governing board of a hospital or professional health care organization may use information obtained by peer review committees for legitimate internal business purposes, including their own defense.

Indiana Medical Licensing Board

Ind. Code 25-22.5-2-1. Creation and membership [effective July 1, 1982].—The medical licensing board of Indiana is created. It shall consist of seven [7] members, not more than four [4] of whom shall be members of the same political party. The members shall be appointed by the governor, and all vacancies occurring on the board shall be filled by the governor. The membership of the board shall consist of:

(1) Five [5] reputable physicians who are graduates of a medical school who hold the degree of doctor of

medicine or its equivalent and who hold valid unlimited licenses to practice medicine in Indiana, and who shall serve for terms of four [4] years each;

(2) One [1] reputable osteopathic physician who is a graduate of an accredited osteopathic medical school who holds the degree of doctor of osteopathy or its equivalent and who holds a valid unlimited license to practice osteopathic medicine in Indiana, who shall serve for a term of four [4] years; and

(3) One [1] member to represent the general public who is a resident of this state and in no way associated with the medical profession other than as a consumer.

Ind Code § 25-22.5-2-7. Powers and duties [effective July 1, 1982].—The board shall:

(a) Promulgate rules, regulations and forms necessary to implement this article. It may adopt rules and regulations concerning, but not limited to, the following areas:

(i) Qualification by education, residence, citizenship, training and character for admission to an examination for licensure or by endorsement for licensure;

(ii) The examination for licensure itself;

(iii) The license or permit itself;

(iv) Fees for examination, permit, licensure, and registration; and

(v) Reinstatement of licenses and permits;

(b) Administer oaths in matters relating to the discharge of their official duties;

(c) Enforce this article, and assign service bureau personnel duties, as may be necessary in the discharge of the board's duty;

(d) Maintain, through the service bureau, full and complete records of all applicants for licensure or permit and of all licenses and permits issued;

(e) Make available, upon request, the complete schedule of minimum requirements for licensure or permit;

(f) Have the power to issue a temporary permit to an applicant for the interim from the date of application until the next regular meeting of the board;

(g) Have the duty to issue an unlimited license, a limited license or a permit, depending upon the qualifications of the applicant, to any applicant who successfully fulfills all of the requirements of this article; and

(h) Adopt rules establishing standards for the competent practice of medicine or osteopathic medicine, or any other form of practice regulated by a limited license or permit issued under this article. [IC 25-22.5-2-7, as added by Acts 1975, P.L. 271, § 1; 1981, P.L. 222, § 154.]

Indiana Medical Licensing Requirements

Ind. Code § 25-22.5-3-1. Minimum requirements [effective July 1, 1982].—The minimum requirements for all applicants for an unlimited license to practice medicine or osteopathic medicine in Indiana must include but are not limited to the following:

(a) [Repealed.]

(b) The applicant must not have a conviction for an act which would constitute a ground for disciplinary sanction under IC 25-22.5-6-2.1(b).

(c) The applicant shall possess the degree of doctor of medicine or doctor of osteopathy or its equivalent from a medical school which was approved by the board as of the time the degree was conferred.

(d) The applicant shall have successfully passed the examination for licensure or shall have satisfied the requirements for licensure by endorsement as prescribed by the board.

(e) The applicant shall be physically and mentally capable of safely engaging in the practice of medicine or osteopathic medicine and shall submit to an examination if deemed necessary by the board to determine such capability.

(f) [Repealed.]

(g) The applicant shall not have had his license previously revoked or suspended by the board or by the licensing agency of any other state by reasons of his inability to safely practice medicine or osteopathic medicine, and those reasons are still valid in the opinion of the board.

(h) The applicant shall have submitted a complete transcript of his educational records, grades and diploma from his medical school with an English translation thereof.

(i) The applicant shall, at the board's discretion, make a personal appearance before it.

Probation, Suspension and Revocation of a Medical License

Ind. Code § 25-22.5-6-2.1. Disciplinary sanctions [effective July 1, 1982].—(a) As used in this section and section 3[25-22.5-6-3] of this chapter, "practitioner" means an individual who holds an unlimited license, limited license, or permit issued under this article.

(b) A practitioner shall conduct his practice in accordance with the standards established by the board under IC 25-22.5-

2-7(h) and is subject to the exercise of the disciplinary sanctions under subsection (e) if, after a hearing, the board finds:

(1) The practitioner has employed or knowingly cooperated in fraud or material deception in order to obtain a license to practice, or has engaged in fraud or material deception in the course of professional services or activities, or has advertised services in a false or misleading manner;

(2) The practitioner has been convicted of a crime which has a direct bearing on the practitioner's ability to continue to practice competently;

(3) A practitioner has knowingly violated any rule adopted by the board under IC 25-22.5-2-7(h);

(4) A practitioner has continued to practice although he has become unfit to practice due to:

(A) Professional incompetence;

(B) Failure to keep abreast of current professional theory or practice;

(C) Physical or mental disability; or

(D) Addiction or severe dependency upon alcohol or other drugs which endangers the public by impairing a practitioner's ability to practice safely;

(5) A practitioner has engaged in a course of lewd or immoral conduct in connection with the delivery of services to patients;

(6) A practitioner has allowed his name or license issued to him under this chapter to be used in connection with any individual who renders services beyond the scope of his training, experience, or competence.[;]

(7) A practitioner, except as otherwise provided by law, has knowingly prescribed, sold, or administered any

drug classified as a narcotic, addicting, or dangerous drug to a habitué or addict; or

(8) A practitioner has had a license to practice in another state revoked or suspended by that state on grounds similar to those under this section. A certified copy of the record of suspension or revocation is conclusive evidence of the other state's suspension or revocation.

(c) The board may order a practitioner to submit to a reasonable physical or mental examination if his physical or mental capacity to practice safely is at issue in a disciplinary proceeding.

(d) Failure to comply with a board order to submit to a physical or mental examination shall render a practitioner liable to the summary revocation procedures under subsection (f) [of this section].

(e) The board may impose any of the following sanctions, singly or in combination, when it finds that a practitioner is guilty of any offense under subsection (b) [of this section]:

(1) Permanently revoke a practitioner's license;

(2) Suspend a practitioner's license;

(3) Censure a practitioner;

(4) Issue a letter or reprimand; or

(5) Place a practitioner on probation status and require the practitioner to:

(A) Report regularly to the board upon the matters which are the basis of probation;

(B) Limit practice to those areas prescribed by the board; or

(C) Continue or renew professional education under a preceptor approved by the board until satis-

factory degree of skill has been attained in those areas which are the basis of the probation.

The board may withdraw the probation if it finds that the deficiency which required disciplinary action has been remedied.

(f) The board may summarily suspend a practitioner's license for a period of ninety [90] days in advance of a final adjudication or during the appeals process if the board finds that a practitioner represents a clear and immediate danger to the public health and safety if he is allowed to continue to practice. The summary suspension may be renewed upon a hearing before the board, and each renewal may be for a period of ninety [90] days or less.

(g) The board may reinstate a license which has been suspended under this chapter if, after a hearing, the board is satisfied that the applicant is able to practice with reasonable skill and safety to patients. As a condition of reinstatement, the board may impose disciplinary or corrective measures authorized under this chapter.

(h) The board shall seek to achieve consistency in the application of the sanctions authorized in this section, and significant departures from prior decisions involving similar conduct shall be explained in the board's findings or orders. [IC 25-22.5-6-2.1, as added by Acts 1981, P.L. 222, § 156.]

Ind. Code 25-22.5-6-3. Disciplinary proceedings [effective July 1, 1982].—(a) Proceedings for the disciplining of a practitioner under section 2.1 [25-22.5-6-2.1] of this chapter must be commenced by the filing of written verified charges with the secretary of the board. Subject to IC 25-1-7 [25-1-7-1—25-1-7-11], these charges may be filed by any resident of Indiana, or by the secretary or any member of the board upon information from whatever source in his possession, which causes the member to have reasonable cause to believe that the matter should be filed and placed before the board for its

determination. Proceedings for disciplinary actions must be conducted according to the administrative adjudication act of Indiana, IC 4-22-1 [4-22-1-1—4-22-1-30]. Approval by a majority of all members of the board shall be required for any action to be taken.

(b) Any person who files charges or testifies before the board in any disciplinary proceeding is immune from civil liability for damages for any sworn or written testimony made with probable cause and without malice.

(c) The administrator, his staff, counsel, investigators, hearing officers, and the board members are immune from civil liability for damages for conduct within the scope and arising out of the performance of their duties.

Hospital Licensing and Regulation

Ind. Code § 16-10-1-1. Licensing of hospitals—From and after the passage of this chapter the state board of health shall be empowered to license and regulate hospitals and ambulatory outpatient surgical centers. Such licensing and regulations shall be accomplished through a council to be created in the manner hereinafter provided, and such other employees as are hereinafter provided for.

Ind. Code 16-10-1-10 [ ]. Suspension or revocation of license—Procedure.—The board may suspend or revoke a license issued hereunder on the recommendation of the council on any of the following grounds:

(a) Violation of any of the provisions of this chapter or of the rules and regulations issued pursuant hereto;

(b) Permitting, aiding, or abetting the commission of any illegal act in such institution; or

(c) Conduct or practice found by the council to be detrimental to the welfare of the patients of such institution.

The procedure governing the suspension or revocation of any license shall be as follows:

(1) A complaint shall be filed by the board stating facts constituting a ground or grounds for revocation or suspension.

(2) The licensee shall be given notice of not less than thirty [30] days of the time and place for a hearing before the council on said complaint, which notice shall be sent by registered mail to the licensee at the address shown in his application. The licensee shall be entitled to be represented by legal counsel at said hearing.

(3) The council may recommend to the board after such hearing either that the license be suspended or that it be revoked.

(4) If the council recommends suspension of a license it may also recommend the conditions to be met by the licensee during the period of suspension in order to entitle the licensee to resume operation of the said hospital or ambulatory outpatient surgical center on the existing license.

(5) If the council recommends either suspension or revocation the board shall, pursuant thereto, enter an order in accordance therewith in which order shall be set forth the grounds of such suspension or revocation.

(6) The council may, in its discretion, after hearing, hold the case under advisement and make a recommendation to the board as to requirements to be met by said licensee in order to avoid either suspension or revocation; and in such cases the board shall enter an order accordingly and notify the licensee

thereof by registered mail. Then if the licensee complies with such order and proves that fact to the satisfaction of the council, the council shall recommend to the board that an order be entered showing satisfactory compliance and dismissing the case because of such compliance, and the board shall enter such an order.

Ind. Code 16-10-1-2 Definitions.—The word "board" as used in this act [16-10-1-1—16-10-1-19], unless otherwise indicated, shall mean the state board of health. The word "council," unless otherwise indicated, shall mean the council herein provided for.

Ind. Code 16-10-1-3 Council—Composition—Term—Vacancy. The council shall consist of eight [8]members, who shall be appointed by the governor within thirty [30] days after this act [16-10-1-1—16-10-1-19] becomes effective, one [1] of whom shall be a member of the medical profession having an unlimited license to practice medicine in the state of Indiana, one [1] of whom shall be a registered nurse, four [4] of whom shall be persons engaged in hospital administration. The two [2] remaining members shall be ex officio members, one [1] of whom shall be appointed by the governor from the state department of public welfare, and the other of whom shall be appointed from the state board of health. Of the original hospital administrators appointed one [1] shall serve for one [1] year, one [1] for two [2] years, one [1] for three [3] years, and one [1] for four [4] years. The original members appointed from the medical profession and the nursing profession shall serve for three [3] years. The members appointed from the department of welfare and board of health shall serve for two [2] years. All subsequent appointments shall be for four [4] years, except that in case of a vacancy the appointee shall serve for the remainder of the unexpired term. Any vacancy shall be filled from the same group as was represented by the outgoing member. The governor shall appoint a chairman and a chairman pro tempore.

16-10-1-11. Appeal to courts.—Any licensee, or applicant for a license, aggrieved by the action of the council and the board may appeal from such action to the circuit or superior court of the county in which the hospital or ambulatory outpatient surgical center in question is located, or is proposed to be located, by filing a notice and bond in the amount of two hundred dollars [$200] for the payment of costs, in the office of the county clerk of such county, who shall thereupon notify the board that such appeal has been taken. The board shall thereupon cause to be certified to such court a copy of the complaint and of the recommendation of the council and the order of the board in cases of suspension or revocation; or of the application and order of refusal of a license, in any case where a license was refused. The case shall then be docketed as a civil action, with the applicant or licensee as the plaintiff and the board as the defendant. No further pleading shall be necessary. Such court shall have jurisdiction to the extent that courts exercise jurisdiction over administrative bodies and may enter an order either sustaining the action of the board and council or setting it aside. The clerk of such court shall certify to the board a copy of the decision of such court. An appeal may be had from the decision of such court. [Acts 1945, ch. 346, § 11, p. 1639; 1972, P.L. 111, § 6.]

Ind. Code 16-10-1-6.5. Management of hospital—Appointment to Medical staff—Medical review—Civil liability.—The governing board of the hospital [hospital] shall be the supreme authority in the hospital, responsible for the management, operation, functioning and control of the hospital, and the appointment of the members of the medical staff and the assignment of privileges to members of the medical staff with the advice and recommendations of the medical staff consistent with their individual training, experience, and other qualifications. The medical staff of a hospital shall be an organized group which shall be responsible to the governing board for the clinical and scientific work of the hospital, advice regarding professional matters and policies to the governing

board, and shall have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients and the preventability of complications and deaths occurring in the hospital. The members of any medical staff committee organized for the purpose of conducting medical review, being retrospective and not a part of current patient care, shall have an absolute immunity from civil liability for communications made in committee meetings, and reports and recommendations made by the committee arising from deliberations by the committee to the governing board of the hospital or another duly authorized medical staff committee. [IC 16-10-1-6.5, as added by Acts 1971, P.L. 217, § 1.]

Ind. Code 16-10-1-6.5. Management of hospital—Medical staff—Medical review—Civil liability.—(a) The governing board of the hospital shall be the supreme authority in the hospital, responsible for:

(1) The management, operation, functioning, and control of the hospital;

(2) The appointment and reappointment of the members of the medical staff, and the assignment of privileges to members of the medical staff, with the advice and recommendations of the medical staff, consistent with their individual training, experience, and other qualifications; and

(3) Establishing requirements for initial and subsequent appointments to and continued service on the hospital's medical staff, consistent with the appointee's individual training, experience, and other qualifications, including such requirements as:

(A) The submission of proof that a medical staff member has qualified as a health care provider under IC 16-9.5;

(B) The performance of patient care and related duties in a manner that is not disruptive to the delivery of quality medical care in the hospital setting; and

(C) Standards of quality medical care which recognize the efficient and effective utilization of hospital resources, as developed by the medical staff.

(b) The governing board shall report, in writing, to the Indiana medical licensing board the results and circumstances of any final, substantive, and adverse disciplinary action taken by the governing board regarding a physician on the medical staff, or an applicant for the medical staff, if the action results in voluntary or involuntary resignation, termination, nonappointment, revocation, or significant reduction of clinical privileges or staff membership. Such a report shall not be made for nondisciplinary resignations nor for minor disciplinary action taken regarding physicians. The governing board and its employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated, if such reports or actions are made in good faith and without malice.

(c) The medical staff of a hospital shall be an organized group which shall be responsible to the governing board for the clinical and scientific work of the hospital, advice regarding professional matters and policies to the governing board, and shall have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients and the preventability of complications and deaths occurring in the hospital.

(d) The members of any medical staff committee organized for the purpose of conducting medical review, being

retrospective and not a part of current patient care, shall have an absolute immunity from civil liability for communications made in committee meetings, and reports and recommendations made by the committee arising from deliberations by the committee to the governing board of the hospital or another duly authorized medical staff committee.

Amendments. The 1983 amendment designated the existing language as present subsections (a), (c), and (d); and added subsection (b).

The 1984 amendment in subsection (a), added subdivision designations (1) and (2), deleted "and" from the end of subdivision (1), inserted "and reappointment" in subdivision (2), and inserted subdivision (3).

Effective Dates. P.L.187-1983, § 8(a) declared an emergency. Approved April 22, 1983.

Indiana Administrative Code Rule 1. Hospital Operation, Management, Construction Equipment Requirements 410 2A [15-1-8—DOCUMENTS, REPORTS AND RECORDS. (1) Documents and records which show ownership and compliance with local, state and federal laws and regulations and adherence to bylaws and regulations of the facility shall be maintained within the hospital and shall be made available for examination by duly authorized representatives of the Council and the Board of Health. Items to be maintained are:

* * *

(c) Minutes of meetings of both the Governing Body, Medical Staff, and their committees thereof; such minutes shall be considered confidential.

* * *

(e) A completed application for each member of the Medical Staff which includes the following data: Date of application, professional education and training by school and year, date of licensure, and number thereof in Indiana, Drug Enforcement Administration number, experience in the practice of medicine, type of Medical Staff appointment and delineation of privileges desired, Medicaid provider number, if one is assigned, pledge to abide by rules and regulations of the hospital, and other items specified by the hospital and its Medical Staff.

IN THE COURT OF APPEALS OF INDIANA

No. 1-883 A247

R. ANTHONY MARRESE,
Appellant-Plaintiff,

vs.

DEACONESS HOSPITAL, INC., THOMAS J. RUSCHE, RONALD W. SOWA, RICHARD WAGNER, RALPH F. CARLSON, ROBERT PENKAVA, WILLIAM D. POWELL,
Appellees-Defendants.

Appeal from the Vanderburgh County Circuit Court Cause No. 9454

The Honorable William H. Miller, Judge

BRIEF OF APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

No. 1-883 A247

R. ANTHONY MARRESE,
Appellant-Plaintiff,

vs.

DEACONESS HOSPITAL, INC.,
THOMAS J. RUSCHE, RONALD W.
SOWA, RICHARD WAGNER, RALPH F.
CARLSON, ROBERT PENKAVA,
WILLIAM D. POWELL,
Appellees-Defendants.

BRIEF OF APPELLANT

I.

Issues Presented for Review

1. Whether the trial court erred as a matter of law when it determined in its order of July 8, 1983 that the hearing committee appointed by the President of the Appellee Hospital staff to consider whether to recommend that Appellant's staff privileges should be revoked is a peer review committee within the meaning of the Indiana Peer Review Act, I.C. 34-4-12.6-1 *et seq.*

2. Whether the trial court abused its discretion in holding that the hearing committee appointed by the President of the Appellee Hospital medical staff to consider whether to recommend revocation of Appellant's staff privileges was not proceeding maliciously and therefore could not be enjoined under I.C. 34-4-12.6-3, when all of the evidence presented at the hearing on the Motion for Preliminary Injunction could, as a matter of law, lead only to a conclusion that the committee was acting with malice.

3. Whether the Indiana Peer Review Act, I.C. 34-4-12.6-1 *et seq.* violates the Fourteenth Amendment of the United States Constitution and Article I, Section 12 of the Indiana Constitution for the reason that the Act improperly limits the civil liability of participants in peer review proceedings and the personnel of a peer review committee, impermissibly limits the ability of parties involved in civil litigation to obtain discovery of peer review records and proceedings and of participants in peer review proceedings, and unlawfully restricts the ability of interested parties to enjoin or otherwise restrain peer review proceedings even when the peer review committee is not proceeding in compliance with the law.

II.

Statement of the Case

The Appellant, R. Anthony Marrese, filed a Verified Complaint for Injunction on July 7, 1983 against the Appellees, seeking to enjoin Appellees from conducting a hearing scheduled for July 9, 1983 to consider a recommendation that Appellant's staff privileges at Deaconess Hospital should be revoked. (Tr. 11, 251) In his Complaint the Appellant requested that the Court issue a temporary restraining order, preliminary injunction and permanent injunction prohibiting Appellees from conducting the hearing scheduled for July 9, 1983.

On July 8, 1983 Appellants request for a preliminary injunction came on for hearing before the Court in the form of a Motion for Preliminary Injunction. Following a hearing at which evidence was presented by the parties, the Court entered an order denying Appellant's Motion for Preliminary Injunction. (Tr. 107)

On August 3, 1983 the Appellant filed his Praecipe for Transcript with the Clerk of the Vanderburgh Circuit Court.

(Tr. 109) The Pre-Appeal Statement, including the assignment of errors, (Tr. 1) was timely filed with this Court on August 15, 1983. On August 11, 1983 this Court granted Appellant's Verified Petition for an Exension of Time within which to File the Record of Proceedings to and including August 29, 1983. The record of proceedings was timely filed with the Clerk of the Supreme Court and Court of Appeals on August 29, 1983. On September 12, 1983 this Court granted Appellant's Verified Petition for an Extension of Time Within Which to File Appellant's Brief on Appeal to and including September 28, 1983. Appellant brings this interlocutory appeal before this Court pursuant to Appellate Rule 4(B)(3).

III.

Statement of Relevant Facts

The Appellant, R. Anthony Marrese, is licensed to practice medicine in the State of Indiana and is a board certified orthopedic surgeon. (Tr. 114) At the time of hearing he was a member of the medical staffs of Deaconess Hospital, St. Marys Medical Center and Welborn Baptist Memorial Hospital, all of which are located in Evansville, Indiana. (Tr. 116) Appellant specializes in disorders of the spine and in all areas of orthopedic surgery. (Tr. 114-116)

The Appellant began his practice in Evansville in early 1973, and was associated with another orthopedic surgeon, Bryant Bloss, for approximately two years. (Tr. 115-117) When the Appellant and Dr. Bloss terminated their business relationship, the Appellant retained counsel to assist him regarding certain questions which arose concerning the distribution of corporate assets and other legal matters. (Tr. 117) The termination of the business relationship was not harmonious. The attorney who served as Appellant's counsel in that matter was Mr. William Powell of Evansville. (Tr. 117) Following the termination of his partnership with Dr. Bloss, the Appellant has been in practice alone.

From 1973 until early 1978 the Appellant served as a member of the Appellee Deaconess Hospital staff without experiencing any professional difficulties. (Tr. 118) Then, in February 1978, Dr. Allen, who was then Chairman of the Appellee Hospital Medical Staff Executive Committee, recommended that an audit be performed of "back surgery" and that the audit be conducted by the Hospital's Medical Audit Committee. (Tr. 119) The audit, however, was not performed by the Medical Audit Committee because Appellant served on the Committee. (Tr. 119) Instead, a special ad hoc committee was established to conduct an audit of all back surgery performed at the Hospital. (Tr. 119)

The special ad hoc audit committee performed two separate audits. One audit was conducted on lumbar laminectomies and the other on lumbar spine fusions performed at the Hospital. (Tr. 119-120) The audits conducted by the special ad hoc committee approved the laminectomies performed at the Hospital even though only sixty-eight percent (68%) of said procedures met nationally established criteria. (Tr. 120) On the other hand, the committee recommended additional study of the spinal fusions performed at Appellee Hospital despite the fact that ninety percent (90%) of such procedures met nationally prescribed standards. (Tr. 120) Interestingly enough, Appellant is the individual who performs the majority of spinal fusions at the Hospital. (Tr. 120) No final action was taken against the Appellant at that time as a result of the study completed by the special ad hoc audit committee. (Tr. 120)

Then, in early 1980 the Appellant received a letter from Dr. Allen informing him that as a result of the special ad hoc committee's review, the Appellant's performance would be discussed on a case by case basis. (Tr. 120) Appellant met with the committee on one occasion, at which only a single case was discussed. (Tr. 121) The Appellee Hospital then decided to appoint Appellant's former associate, Dr. Bloss, and another physician to the special ad hoc audit committee. This is the

same Dr. Bloss from whom Appellant had severed business ties in an unfriendly fashion. (Tr. 208) Both Dr. Bloss and the other physician have now been witnesses against the Appellant in the disciplinary matter. Tr. 115-117, 121)

The special ad hoc audit committee, even with the addition of the two physicians, was still unable to reach any conclusions. (Tr. 121) No action was taken by the Hospital or its committee against Appellant. (Tr. 121) The Hospital then removed about eight cases from the cases originally reviewed by the special ad hoc committee and sent them to an outside auditor. (Tr. 121, 123) These eight cases were reviewed by the outside auditor, but he was similarly unable to arrive at any firm conclusion regarding the appropriateness of Appellant's patient care. (Tr. 123)

Next, the Hospital obtained the services of an independant and private auditing firm, InterQual, located in Chicago, Illinois. (Tr. 123-124) InterQual conducted an off-site evaluation of ninety-three (93) of Appellant's cases, and recommended that Appellant be required to reply to the results of the audit, and that possibly his privileges be withdrawn. (Tr. 124) InterQual completed its report in early 1982. (Tr. 124) It did not, however, utilize current data and instead analyzed patient care rendered by Appellant during the year 1980. (Tr. 124)

In March 1982, Appellant received a letter from the Appellee Hospital stating that he was the subject of a review based upon the report rendered by InterQual. (Tr. 140-141) At a meeting of the Medical Staff Executive Committee held on April 28, 1982 the committee voted to recommend the revocation of Appellant's staff membership and clinical privileges at the Hospital. (Tr. 140-143) Then, on April 19, 1982 the Appellant was informed by Dr. Nachtnebel, Chairman of the Medical Staff Executive Committee, that the committee had voted to recommend the revocation of Appellant's staff membership and clinical privileges at the hospital. (Tr. 140-143) Appellant was also informed, in Nachtnebel's letter, of his

right to a "fair hearing" pursuant to the By-laws and Fair Hearing Plan adopted by the Hospital medical staff. (Tr. 142-143) Finally, Appellant was provided, in skeleton outline, with a short statement of the charges upon which the recommendation was based. (Tr. 143)

Appellant requested a fair hearing pursuant to the Hospital By-laws and was advised by letter dated July 9, 1982 that a fair hearing would be held, before a hearing committee appointed by Dr. Nachtnebel, now the President of the Hospital staff, on July 24, 1982. (Tr. 141, 145) He was also informed by the July 9 letter of the identity of the persons who would comprise the hearing committee and of the specific issues which would be considered at the hearing. (Tr. 146)

The July 24, 1982 hearing was continued pursuant to Appellant's request for additional time to prepare for hearing. (Tr. 145, 169) Despite the fact that Appellant submitted his request for continuance nearly three weeks before the July 24 hearing date, he was not notified of the postponement until just two days before the hearing date. (Tr. 145, 169) Thus, Appellant was put to the trouble of preparing for the hearing. (Tr. 145) Appellant and the Hospital then discussed the possibility of holding the hearing on either August 22-23, 1982 or October 17-18, 1982. (Tr. 169) The proposed dates were acceptable to Appellant. However, the Hospital took no action with regard to this matter until Appellant himself requested a fair hearing pursuant to the fair hearing plan, on May 4, 1983. (Tr. 166, 169, 187, 188, 253, 254)

On May 4, 1983 the Appellant requested, pursuant to the Hospital's By-laws, that the hearing committee set a hearing date within thirty to forty-five days after receipt of said request. (Tr. 91, 169, 187, 188, 253, 254) The Appellant was notified by letter dated June 13, 1983 that the hearing would be held on July 9, 1983 which was more than sixty days from the date of the May 4 request. (Tr. 182) On May 18, 1983 Appellant was notified by the President of the Hospital Professional Staff that

Drs. Thomas J. Rusche, Ronald W. Sowa, Richard Wagner, Ralph F. Carlson and Joseph C. Lawrence were to comprise the hearing committee appointed pursuant to the fair hearing plan. (Tr. 177-181) Shortly thereafter, Appellee, Robert Penkava was also appointed to the hearing panel. In addition, the May 18 notice also informed Appellant that the hearing panel would be advised by the firm of Frick and Powell and the Appellee William Powell in particular. (Tr. 177-181)

Finally, Appellant was notified in the May 18, 1983 correspondence that the charges against him had been amended to include allegations that he engaged indisruptive behavior at the Hospital. (Tr. 177-181) This pattern of conduct, according to the notice, is illustrated by incidents involving, among others, Dr. D. J. Carlson and Dr. Sam B. Baker. (Tr. 180) One of the incidents cited as an example of disruptive behavior involved allegations that Appellant illegally refused to return certain X-rays to Deaconess Hospital. (Tr. 180) This incident was the subject of a lawsuit which was settled amicably by the parties out of court. (Tr. 165-167) Much to Appellant's surprise, the Appellees cited such incident as one of the grounds for the allegation that he had engaged in disruptive behavior. (Tr. 165-167) These allegations of disruptive behavior were added to the charges without prior notice to Appellant. (Tr. 165-167).

The Appellant expressed his objections to the composition of the fair hearing panel. (Tr. 164-167, 148-159, 216) One of the panel members, Dr. Ralph F. Carlson, is the father of Dr. D. J. Carlson, who is one of the individuals accusing Appellant of engaging in disruptive behavior and who was scheduled to testify at the fair hearing. (Tr. 158, 216) In addition, there is documentary evidence that another member of the committee, Dr. Rusche, has strong personal biases against orthopedic surgeons performing spinal surgery. (Tr. 148-153) It was Appellant's belief that such professional territorialism clearly would interfere with Dr. Rusche's ability to evaluate the evidence in an objective manner. (Tr. 148-152)

Similarly, Appellant objected to the fact that Dr. Robert Penkava is a partner in medical practice with Dr. Sam Baker, who was at one time scheduled to testify against Appellant at the fair hearing. (Tr. 214) Baker is also a defendant in a pending federal action brought by Appellant against certain individuals affiliated with the Hospital. (Tr. 196, 219) Furthermore, it was established that another panel member, Dr. Ronald Sowa, is a business partner of a defendant in the pending federal suit and a partner of one of the witnesses who was scheduled to testify against Appellant at the fair hearing. (Tr. 155-156)

Finally, while Appellant had no reason to believe that panel member Dr. Richard Wagner would be biased or otherwise prejudiced, he expressed concern over the fact that Wagner was a family practitioner with no expertise in the area of medicine he was called upon to evaluate. (Tr. 157)

The Appellant also vigorously objected to Mr. William Powell serving as legal advisor to the fair hearing panel. (Tr. 124-138, 167, 192) Prior to the time the present difficulties arose between Appellant and the Hospital in 1978, the Appellant was represented by Mr. Powell in connection with various legal matters. (Tr. 117, 124-25) On February 22, 1980 the Appellant received a letter from Mr. Powell informing him that Powell would no longer represent him personally because of the possibility of a conflict of interest arising due to the fact that Powell represents the Hospital. (Tr. 126) A month later Appellant was informed by Mr. Powell that Powell was representing the Hospital with regard to disciplinary procedures initiated against Appellant. (Tr. 128)

In September 1980, when advised by his attorney that Mr. Powell's representation of the Hospital may not be proper, based on Powell's past association with Appellant, the Appellant formally requested that Mr. Powell withdraw from all participation in these proceedings. (Tr. 130-31) On September

23 1980 Powell informed Appellant's attorney that the firm of Frick and Powell was withdrawing from any and all representation of Deaconess Hospital in connection with any matter affecting R. Anthony Marrese, directly or indirectly, and "we have recommended that Deaconess obtain completely independent counsel for this matter." (Tr. 131, 135-138)

Mr. Powell was also the subject of a complaint filed by the Appellant with the Indiana Supreme Court Disciplinary Commission (Tr. 210) and is named as a Defendant in the pending federal action. (Tr. 197-217) Finally, there was undisputed evidence presented at trial that Mr. Powell had "spread" incorrect information in the community regarding alleged limitations on Appellant's surgical privileges at another Evansville hospital. (Tr. 204).

Despite the fact that Mr. Powell pledged to withdraw from these proceedings because of the existence of a potential conflict and despite the ill-will which exists between Powell and Appellant, Mr. Powell has continued to represent the hospital in this matter. For example, he prepared the notice of hearing and the amended charges furnished to Appellant on May 18, 1983 (Tr. 181) and drafted the procedural guidelines to govern the conduct of the hearing committee. (Tr. 185). Powell went so far as to take responsibility for "the selection of a hearing committee", including the membership and qualifications of the committee. (Tr. p. 170). He has continued to advise the Hospital and the hearing panel with regard to this disciplinary action despite the fact he said he would cease all such representation.

At the trial of this cause, held on July 8, 1983, the Appellees, acting through counsel, informed the Court that Dr. Sowa would be removed from the panel and replaced by Dr. Sam Baker (Tr. 390) who had initially been named as one of the witnesses scheduled to testify against Appellant at the fair hearing set for July 9, 1983. (Tr. 214) In addition, Dr. Baker is

a Defendant in the federal action initiated by Appellant which is still pending on appeal before the Seventh Circuit Court of Appeals. (Tr. 196, 219) Furthermore, there was also evidence presented at the hearing which indicates that Dr. Baker took part in the original decision of the Medical Staff Executive Committee to initiate disciplinary proceedings against Appellant. (Tr. 160) This is demonstrated by the letter of March 8, 1982 written by counsel for the hospital to Dr. Baker. (Tr. 160).

Finally, at the hearing held on July 8, 1983 the Appellees also revealed to the Court that Dr. D. J. Carlson would not testify against the Appellant at the fair hearing, as initially planned. (Tr. 390). His father Dr. Ralph F. Carlson, however, was not removed from the hearing panel.

SUMMARY OF ARGUMENT NOT INCLUDED

Filed
Feb. 10, 1984
Marjorie W. O'Laughlin
Clerk of the
Indiana Supreme and
Court of Appeals

IN THE COURT OF APPEALS OF INDIANA
First District

R. ANTHONY MARRESE,
Appellant-Plaintiff,

v.

DEACONESS HOSPITAL, INC., THOMAS J. RUSCHE, RONALD W. SOWA, RICHARD WAGNER, RALPH F. CARLSON, ROBERT PENKAVA, WILLIAM D. POWELL,
Appellees-Defendants.

Cause No. 1-883-A-247

ORDER

This cause pending before the Court on the following:

1. Appellees' Verified Motion to Dismiss;
2. Appellees' Brief in Support of Motion to Dismiss;
3. Appellant's Memorandum in Opposition to Motion to Dismiss Appeal;
4. Appellees' Reply to Appellant's Memorandum in Opposition to Motion to Dismiss Appeal.

All of which are more particularly in the following words and figures, to-wit:

(H. I.)

And the Court, having examined these matters, having examined the record of the proceedings herein, and being duly advised, now finds that the Appellees' Motion to Dismiss should be granted for the reason that this appeal has become moot.

It is THEREFORE ORDERED that the Appellees' Motion to Dismiss is granted and this cause is dismissed.

ORDERED this 10th day of February, 1984.

/s/ PAUL H. BUCHANAN JR.
Chief Judge

[Seal]